(21,121.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 132.

GUSTAV HOLMGREN, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 21, 1909.

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BLURR

a United States Circuit Court of Appeals for the Ninth Circuit.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Northern District of California.

1 In the District Court of the United States in and for the Northern District of California.

No. 4362.

UNITED STATES
vs.
GUSTAV HOLMGREN.

Order Extending Return Day of Writ of Error and Citation.

Good cause appearing therefor, it is hereby ordered that the return days of the writ of error and citation be, and the same are, hereby extended to October 9th, 1906.

September 12, 1906.

EDWARD WHITSON,
U. S. District Judge.

[Endorsed:] No. 1382. U. S. District Court Northern Dist. of Cal. United States vs. Gustav Holmgren. Order Extending Return Day of Writ of Error and Citation. Filed Sep. 13, 1906. F. D. Monckton, Clerk. Re-filed, Oct. 9, 1906. F. D. Monckton, Clerk.

2 In the District Court of the United States in and for the Northern District of California.

No. 4362.

UNITED STATES OF AMERICA
vs.
GUSTAV HOLMGREN.

Præcipe for Transcript.

To the Clerk of said Court:

SIR: Please make return to the writ of error issued, by transmitting to the United States Circuit Court of Appeals, for the Ninth Circuit, true copies of the following, viz:

D PAGES

1. The indictment in full and with all endorsements thereon.
2. Demurrer to indictment.
3. Order overruling demurrer.
4. Minutes of trial.
5. Verdict.
6. Judgment.
7. Bill of exceptions.
8. Assignment of errors.
9. Transmit the original writ of error.
10. Transmit the original citation on the writ of error.
11. Transmit copy of cost bond.

3 12. Attach certificate to above as being the return to writ of error, and also certify that copy of writ of error was lodged with clerk for defendant in error, on date of issuance of writ.

August 20, 1906.

Respectfully,

BERT SCHLESINGER AND
MARSHALL B. WOODWORTH,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed, Aug. 20, 1906. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 8th day of September, 1906, pursuant to a writ of error duly issued and now on file in the clerk's office of the District Court of the United States, for the Northern District of California wherein Gustav Holmgren, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against

4 the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John J. De Haven, Judge of the United States District Court for the Northern District of California, this 9th day of August, A. D. 1906.

JOHN J. DE HAVEN,
U. S. District Judge.

UNITED STATES OF AMERICA, *ss:*

On this 9th day of August, in the year of our Lord one thousand nine hundred and six, personally appeared before me F. D. Monckton, Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, the subscriber, Marshall B. Woodworth, and makes

oath that he delivered a true copy of the within citation to Benjamin L. McKinley, Assistant U. S. Attorney.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me at San Francisco, California, this 9th day of August, A. D. 1906.

[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] No. 4362. U. S. Circuit Court of Appeals, for the Ninth Circuit. Gustav Holmgren, Plaintiff in Error, vs. United States. Citation Filed August 9th, 1906. Jas. P. Brown, Clerk U. S. District Court, Northern District of California. By J. S. Manley, Deputy Clerk.

Writ of Error (Original).

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between — the United States, defendant in error, a manifest error hath happened, to the great damage of the said Gustav Holmgren, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 8th day of September next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 9th day of August, in the year of our Lord one thousand, nine hundred and six.

[SEAL.] JAS. P. BROWN,
Clerk U. S. District Court, Northern District of California.

Allowed by
JOHN J. DE HAVEN,
U. S. District Judge.

Service admitted this 9th day of August, 1906.

BENJ. L. McKINLEY,
Ass't U. S. Attorney.

The Answer of the Judge of the District Court of the United States for the Northern District of California to the Foregoing Writ.

The record and proceedings whereof mention is within made, with all things touching the same, I certify under the seal of said Court, to the United States Circuit Court of Appeals for the
7 Ninth Circuit, within mentioned, at the day and place within contained in a certain schedule to this writ annexed as within I am commanded.

By the Court.

[SEAL.]

JAS. P. BROWN, *Clerk*,
By J. S. MANLEY, *Deputy Clerk*.

[Endorsed:] No. 4362. U. S. District Court, Northern District of California. No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Gustav Holmgren, Plaintiff in Error, vs. United States, Defendant in Error. Writ of Error. Filed August 9th, 1906. Jas. P. Brown, Clerk U. S. District Court, Northern District of California. By J. S. Manley, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

Indictment.

(Section 5395, R. S. U. S.)

At a Stated Term of Said Court Begun and Holden at the City and County of San Francisco, Within and for the Northern District of California, on the Second Monday in July, in the Year of Our Lord One Thousand Nine Hundred and Five.

8 The Grand Jurors of the United States of America, within and for the District aforesaid, on their oath present:

That heretofore, to wit, on the eighth day of October, in the year of our Lord one thousand nine hundred and two, Harry Johnson, late of the Northern District of California, who was at all times herein mentioned an alien not entitled to be admitted to be a citizen of the United States, appeared in person before the Superior Court of the said City and County of San Francisco, State of California, in the City Hall, in said Coty and County of San Francisco, State and Northern District of California, and which said Court was then and there and at all times herein mentioned a court of record of the said State of California, having common-law jurisdiction and a seal and a clerk, and did then and there apply to said Superior Court to be admitted to be a citizen of the United States, and that the

hearing of said application of said Harry Johnson to be admitted to be a citizen of the United States then and there became and was pending before the said Superior Court.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That, Gustav Holmgren, late of the Northern District of California, to procure the naturalization of the said Harry Johnson in the said hearing of said application then and there pending as afore-
9 said, appeared in person and was then and there produced as a witness before said Superior Court to testify for and on behalf of the said Harry Johnson in the matter of said application pending as aforesaid, concerning the qualifications of the said Harry Johnson to be admitted to be a citizen of the United States, and the said Gustav Holmgren then and there by William Hall Phelps, then and there a deputy clerk of the said Superior Court was in due form of law sworn, and did then and there take oath, that he, the said Gustav Holmgren, would testify truly in said proceeding concerning the qualifications of the said Harry Johnson to be admitted to be a citizen of the United States, the said William Hall Phelps, deputy clerk as aforesaid, then and there having lawful authority to administer said oath to him, the said Gustav Holmgren, as a witness in the said proceeding, and the said proceeding being a proceeding in which the laws of the United States authorized such oath to be administered; and it then and there had become and was material for said Court, in said hearing in determining the said application of the said Harry Johnson, to know and determine, whether the said Harry Johnson had resided within the United States continuously for a period of five years immediately prior to the time of the said hearing of the said application; and whether the said Harry Johnson had resided in the United States
10 continuously during the three years next preceding his, said Harry Johnson's arriving at the age of twenty-one years; and whether said Harry Johnson had continued, after his said arriving at said age and until the said time of said hearing, so to reside in the United States, and whether he, the said Gustav Holmgren, had been acquainted with and had known the said Harry Johnson for the said five years immediately preceding said hearing; and the said Gustav Holmgren, having taken said oath to testify as aforesaid, did then and there willfully, knowingly, falsely and feloniously, and contrary to his said oath, testify in substance and to the effect, that the said Harry Johnson had resided in the United States continuously for a period of five years immediately prior to the time of the said hearing of the said application, and had resided in the United States continuously during the three years next preceding his arriving at the age of twenty-one years, and had continued from his said arriving at said age and until the said time of said hearing so to reside in the United States, and that he, the said Gustav Holmgren, had been acquainted with and had known the said Harry Johnson, during the said five years immediately preceding the said hearing; whereas in truth and in fact, as he, the said Gustav Holmgren, then and there well knew, the said Harry Johnson had not

resided continuously within the United States for a period
11 of five years immediately prior to the said hearing of the said application, or for as great a period as four years immediately prior to the time of said hearing; and whereas, in truth and in fact as the said Gustav Holmgren then and there well knew, the said Harry Johnson had not resided in the United States continuously during the three years next preceding his, said Harry Johnson's arriving at the age of twenty-one years, and had not resided in the United States while under the age of twenty-one years at all; and whereas, in truth and in fact, as the said Gustav Holmgren then and there well knew, the said Harry Johnson had not continued to reside in the United States from the time of his said arriving at the age of twenty-one years until the time of said hearing; and whereas, in truth and in fact, as the said Gustav Holmgren then and there well knew, he, the said Gustav Holmgren, had not been acquainted with the said Harry Johnson for five years immediately prior to said hearing or for as great a period as four years immediately prior to the time of said hearing; and whereas, in truth and in fact, as the said Gustav Holmgren then and there well knew, he, the said Gustav Holmgren had not known the said Harry Johnson for the period of five years immediately prior to the time of said hearing or for as great a period as the period of four years immediately prior to said hearing.

12 And the Grand Jurors aforesaid, upon their oath aforesaid, do say that the said Gustav Holmgren, in manner and form aforesaid, having taken oath before a competent tribunal in a case wherein a law of the United States authorized an oath to be administered, that he would truly depose and testify, willfully and contrary to such oath, did depose and state material matter which he did not then believe to be true.

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided.

Second Count.

(Section 5395, R. S. U. S.)

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That heretofore, to wit, on the ninth day of January, in the year of our Lord one thousand nine hundred and three, Tonnes Berensen, late of the Northern District of California, who was at all times herein mentioned an alien not entitled to be admitted to be a citizen of the United States, appeared in person before the Superior Court of the said city and county of San Francisco, State of California, in the City Hall in said city and county of San Francisco, State and Northern District of California, and which said Court was
13 then and there and at all times herein mentioned a court of record of the said State of California, having common law jurisdiction and a seal and a clerk, and did then and there apply

to the said Superior Court to be admitted to be a citizen of the United States and that the hearing of said application of said Tonnes Berensen to be admitted to be a citizen of the United States then and there became and was pending before the said Superior Court.

And the Grand Jurors aforesaid, on their — aforesaid, do further present: That Gustav Holmgren, late of the Northern District of California, to procure the naturalization of the said Tonnes Berensen in the said hearing of said application, then and there pending as aforesaid, appeared in person and was then and there produced as a witness before said Superior Court to testify for and on behalf of the said Tonnes Berensen in the said hearing of said application pending as aforesaid, concerning the qualifications of the said Tonnes Berensen to be admitted to be a citizen of the United States, and the said Gustav Holmgren then and there by Thomas John Quinn, then and there a deputy clerk of the said Superior Court, was in due form of law sworn, and did then and there take oath, that he, the said Gustav Holmgren, would testify truly in said proceedings concerning the qualifications of the said Tonnes Berensen to be admitted to be a citizen of the United States, the said Thomas
14 John Quinn, deputy clerk as aforesaid, then and there having lawful authority to administer said oath to him, the said Gustav Holmgren, as a witness in the said proceeding, and the said proceeding being a proceeding in which the laws of the United States authorized such oath to be administered; and it then and there had become and was material for said Court, in said hearing in determining the said application of the said Tonnes Berensen, to know and determine whether the said Tonnes Berensen had resided within the United States continuously for a period of five years immediately prior to the time of the said hearing of the said application, and whether the said Tonnes Berensen had resided in the United States continuously during the three years next preceding his, said Tonnes Berensen's arriving at the age of twenty-one years, and whether said Tonnes Berensen had continued, after his said arriving at said age and until the said time of said hearing, so to reside in the United States, and whether he, the said Gustav Holmgren, had been acquainted with and had known the said Tonnes Berensen for the said five years immediately preceding said hearing; and the said Gustav Holmgren, having taken said oath to testify as aforesaid, did then and there willfully, knowingly, falsely and feloniously, and contrary to his said oath, testify in substance and to the effect, that the said Tonnes Berensen had resided in the United States
15 continuously for a period of five years immediately prior to the time of the said hearing of the said application, and had resided in the United States continuously during the three years next preceding his arriving at the age of twenty-one years, and had continued from his said arriving at said age and until the said time of said hearing so to reside in the United States, and that he, the said Gustav Holmgren, had been acquainted with and had known the said Tonnes Berensen during the said five years immediately preceding the said hearing; whereas in truth and in fact, as he, the said Gustav Holmgren, then and there well knew, the said

Tonnes Berensen had not resided continuously within the United States for a period of five years immediately prior to the said hearing of the said application, or for any greater period than two years and six months immediately prior to the time of said hearing; and whereas, in truth and in fact, as the said Gustav Holmgren then and there well knew, the said Tonnes Berensen had not resided in the United States continuously during the three years next preceding his, said Tonnes Berensen's arriving at the age of twenty-one years and had not resided in the United States while under the age of twenty-one years at all; and whereas, in truth and in fact, as the said Gustav Holmgren then and there well knew, the said Tonnes
16 Berensen had not continued to reside in the United States from the time of his said arriving at the age of twenty-one years until the time of said hearing; and whereas in truth and in fact, as the said Gustav Holmgren then and there well knew, he, the said Gustav Holmgren, had not been acquainted with the said Tonnes Berensen for five years immediately prior to said hearing or for as great a period as two years and six months immediately prior to the time of said hearing; and whereas, in truth and in fact, as the said Gustav Holmgren then and there well knew, he, the said Gustav Holmgren, had not known the said Tonnes Berensen for the period of five years immediately prior to the time of said hearing or for any greater period than two years and six months immediately prior to said hearing.

And the Grand Jurors aforesaid, upon their oath aforesaid, do say that the said Gustav Holmgren, in manner and form aforesaid, having taken oath before a competent tribunal in a case wherein a law of the United States authorized an oath to be administered, that he would truly depose and testify, willfully and contrary to such oath, did depose and state material matter which he did not then believe to be true.

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United
17 States of America, in such case made and provided.

Third Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to wit, on the twenty-first day of September in the year of our Lord one thousand nine hundred and three, Frank Werta, late of the Northern District of California, who was at all times herein mentioned an alien not entitled to be admitted to be a citizen of the United States, appeared in person before the Superior Court of the said city and county of San Francisco, State of California, in the City Hall, in said city and county of San Francisco, State and Northern District of California, and which said Court was then and there and at all times herein mentioned a court of record of the said State of California, having common-law jurisdiction and a seal and a clerk, and did then and there apply to said Superior Court to be admitted to be a citizen of the United States,

and that the hearing of said application of the said Frank Werta to be admitted to be a citizen of the United States then and there became and was pending before the said Superior Court.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present: That Gustav Holmgren, late of the Northern District of California, to procure the naturalization of the said
18 Frank Werta in the said hearing of said application then and there pending as aforesaid, appeared in person and was then and there produced as a witness before said Superior Court to testify for and on behalf of the said Frank Werta in the said hearing of said application pending as aforesaid, concerning the qualifications of the said Frank Werta to be admitted to be a citizen of the United States and the said Frank Werta then and there by Thomas John Quinn, then and there a deputy clerk of said Superior Court, was in due form of law sworn, and did then and there take oath that he, the said Gustav Holmgren, would testify truly in said proceeding concerning the qualifications of the said Frank Werta to be admitted to be a citizen of the United States, the said Thomas John Quinn, deputy clerk as aforesaid, then and there having lawful authority to administer said oath to him, the said Gustav Holmgren, as a witness in said proceeding, being a proceeding in which the laws of the United States authorized such oath to be administered; and it then and there had become and was material for said Court, in said hearing, in determining the said application of the said Frank Werta, to know and determine whether the said Frank Werta had resided within the United States continuously for a period of five years immediately prior to the time of the said hearing of the said application; and whether the said Frank
19 Werta had resided in the United States continuously during the three years next preceding his, the said Frank Werta's arriving at the age of twenty-one years, and whether said Frank Werta had continued, after his said arriving at said age and until the said time of said hearing, so to reside in the United States, and whether he, the said Gustav Holmgren, had been acquainted with and had known the said Frank Werta for the said five years immediately preceding said hearing; and the said Gustav Holmgren, having taken said oath to testify as aforesaid, did then and there willfully, knowingly, falsely, and feloniously, and contrary to his said oath, testify in substance and to the effect; that the said Frank Werta had resided in the United States continuously for a period of five years immediately prior to the time of the said hearing of the said application, and had resided in the United States continuously during the three years next preceding his arriving at the age of twenty-one years, and had continued from his said arriving at said age and until the said time of said hearing so to reside in the United States, and that he, the said Gustav Holmgren, had been acquainted with and had known the said Frank Werta during the said five years immediately preceding the said hearing; whereas, in truth and in fact as he, the said Gustav Holmgren, then and there well knew,

the said Frank Werta had not resided continuously in
20 the United States for a period of five years immediately prior to the said hearing of the said application, or for as great a period as four years, immediately prior to the time of said hearing; and whereas in truth and in fact as the said Gustav Holmgren then and there well knew the said Frank Werta had not resided in the United States continuously during the three years next preceding his said Frank Werta's arriving at the age of twenty-one years, and had not resided in the United States while under the age of twenty-one years at all; and whereas in truth and in fact, as the said Gustav Holmgren then and there well knew, the said Frank Werta had not continued to reside in the United States from the time of his said arriving at the age of twenty-one years until the time of said hearing; and whereas in truth and in fact, as the said Gustav Holmgren then and there well knew, he the said Gustav Holmgren had not been acquainted with the said Frank Werta for five years immediately prior to the said hearing or for as great a period as four years immediately prior to the time of said hearing; and whereas, in truth and in fact, as the said Gustav Holmgren then and there well knew, he, the said Gustav Holmgren, had not known the said Frank Werta for the period of five years immediately prior to the time of said hearing, or for as great a period as the period of four years immediately prior to said hearing.

21 Against the peace and dignity of the United States of America, and contrary to the form of the statutes of the said United States of America, in such cases made and provided.

ROBT. T. DEVLIN,
United States Attorney.

Names of witnesses examined before the said Grand Jury on finding the foregoing indictment:
Charles C. Morris.
Thomas J. Quinn.
Frank August Wirtenen (Also known as Frank Werta).
Tonnes Berensen.
William H. Phelps.
Harry Johnson.

[Endorsed:] A true bill. E. Linforth, Foreman Grand Jury, presented in open Court and filed Octr. 7th, 1905. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

Form No. 168. Back or Cover of Indictment, with Plea and Judgment. Arraigned Nov. 2, 1905. Mch. 14, 1906. Pleads not guilty. Tried April 5-6-7, 1906. Verdict not guilty on the 1st and 2d counts of the Indictment and guilty on the 3d count of the Indictment. April 13, 1906. New trial granted. Tried July 12-13, 1906. Verdict guilty on 3d count of the Indictment.

22 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GUSTAV HOLMGREN, Defendant.

Demurrer to Indictment.

Comes now Gustav Holmgren, the defendant in the above-entitled action, into Court, and having heard read the indictment on file herein says that the indictment and the matters therein contained in manner and form as the same are therein set forth and stated are not sufficient in law, and for that reason he, the said Gustav Holmgren, is not bound by the law of the land to answer the same and this he is ready to verify:

I.

That the said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

II.

That the said indictment does not state facts sufficient to constitute an offense against the United States in this: That it fails to
23 state the nationality of the person referred to in said indictment as applicants for citizenship.

III.

That it does not appear from the first count of said indictment that any declaration of intention was ever made by said Harry Johnson to become a citizen of the United States.

IV.

That it does not appear, nor is there any allegations in the said first count of said indictment that the said Harry Johnson, the applicant therein mentioned, had not resided in the United States for the period of five years prior to the making of said application of Harry Johnson to be admitted a citizen of the United States; that it does not appear from said first count of said indictment that said Harry Johnson had not resided in the United States continuously during the three years next preceding his arrival at the age of twenty-one years.

V.

That is does not appear from the second count of said indictment that any declaration of intention was ever made by said Tonnes Berensen to become a citizen of the United States.

VI.

That it does not appear from the second count of the indictment nor is there any allegation therein contained, that the said
24 Tonnes Berensen, the applicant therein mentioned, had not resided in the United States for the period of five years prior to the making of said application of Tonnes Berensen to be admitted a citizen of the United States; that it does not appear from said second count of the indictment that said Tonnes Berensen had resided in the United States continuously during the three years next preceding his arrival at the age of twenty-one years.

VII.

That it does not appear from the third count of said indictment that any declaration of intention was ever made by Frank Werta to become a citizen of the United States.

VIII.

That it does not appear, nor can it be ascertained from the third count of the indictment that the said Frank Werta, the applicant therein mentioned, had not resided in the United States for the period of five years prior to the making of said application of Frank Werta to become a citizen of the United States; that it does not appear from said third count of said indictment that the said Frank Werta had not resided in the United States continuously during the three years next preceding his arrival at the age of twenty-one years.

IX.

That each and every count of said indictment is indefinite
25 and uncertain in the particulars specified in subdivisions III, IV, V, VI, VII and VIII of this demurrer.

X.

That this Court has no jurisdiction for the reason that the alleged offenses sought to be set out are exclusively matters of state cognizance.

XI.

That there is no statute conferring jurisdiction on the United States District Court for the alleged offense sought to be set out in the indictment filed herein.

Wherefore the defendant prays that his demurrer to the indictment be sustained, and that he go hence without day.

BERT SCHLESINGER,
Attorney for Defendant.

[Endorsed:] Filed Nov'r 4, 1905. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

Service of a copy of the within is hereby acknowledged this fourth day of November, A. D. 1905.

ROBT. T. DEVLIN,
Attorney for Plaintiff.

BLURRED

26 At a Stated Term of the District Court of the United States for the Northern District of California, Held at the Court-room in the City and County of San Francisco, on Friday, the 9th Day of March, A. D. 1906.

Present: The Honorable John J. De Haven, Judge.

[Number and Title of Case.]

Order Overruling Demurrer.

In this case, the demurrer to the indictment, having been heretofore submitted to the Court for decision, now, after due consideration had thereon, it is by the Court ordered that said demurrer be, and the same is hereby, overruled.

At a Stated Term of the District Court of the United States for the Northern District of California, Held at the Court-room in the City and County of San Francisco, on Wednesday, the 14th Day of March, A. D. 1906.

Present: The Honorable John J. De Haven, Judge.

[Number and Title of Case.]

Plea.

In this case, the defendant being present in open court with S. C. Wright, his Attorney, on motion of F. A. Duryea, Special Assistant U. S. Attorney, the defendant having been heretofore duly arraigned, was called upon to plead to the indictment on file herein against him. Thereupon the defendant, by his attorney,
27 entered a plea of not guilty. By the Court ordered that the trial hereof be, and the same is hereby, set for April 3, 1906.

At a Stated Term of the District Court of the United States for the Northern District of California, Held at the Court-room in the City and County of San Francisco, on Thursday, the 12th Day of July, A. D. 1906.

Present: The Honorable John J. De Haven, Judge.

[Number and Title of Case.]

Minutes of Trial.

In this case, the defendant being present in open court with M. B. Woodworth, his attorney, on motion of Benjamin L. McKinley, Assistant U. S. Attorney, it is ordered that the trial hereof do now proceed. The Court proceeded to impanel a jury to try this case as follows:

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James King—Accepted and sworn.
John Barnet—Challenged peremptorily by Government, and excused.
John T. Cochran—Accepted and sworn.
A. S. Olney—Challenged peremptorily by defendant, and excused.
W. A. Dietrich—Accepted and sworn.
T. L. Tormey—Challenged peremptorily by defendant and excused.
P. E. McCarthy—Accepted and sworn.
Charles C. Carpenter—Accepted and sworn.
28 W. R. Pitt—Accepted and sworn.
Justin P. Moore—Challenged peremptorily by defendant and excused.
Robert Day—Challenged peremptorily by defendant and excused.
Otto Lemcke—Accepted and sworn.
George W. Hoguet—Challenged for cause by defendant, and juror excused.
William Fahey—Excused by the Court.
J. B. Keenan—Accepted and sworn.
A. H. Lake—Challenged peremptorily by defendant and juror excused.
Michael J. Henley—Challenged peremptorily by defendant, and excused.
William Mason—Accepted and sworn.
F. G. Eiben—Accepted and sworn.
M. H. Garcia—Challenged peremptorily by defendant, and excused.
E. G. Denniston—Challenged peremptorily by defendant, and excused.
Geo. R. Armstrong—Accepted and sworn.
J. N. Priest—Challenged peremptorily by defendant and juror excused.
George J. Wright—Accepted and sworn.

The jury being now complete and composed of the following nam*de* persons, to wit: James King, John T. Cochran, W. A. Dietrich, P. E. McCarthy, Charles C. Carpenter, W. R. Pitt, Otto Lemcke, J. B. Keenan, William Mason, F. G. Eiben, George
29 R. Armstrong and George J. Wright,—Mr. McKinley stated the case of the Government to the Court and jury, and called Frank Werta, Albert Houston, John Joki, M. M. Davis, F. A. Duryea, F. O. Johansen, Thos. F. O'Neil, Thos. J. Quinn and Albert Kolchmainen, who were duly sworn and examined as witnesses on behalf of the Government, and rested. Mr. Woodworth then moved the Court to instruct the jury to return a verdict of not guilty upon the testimony introduced by the Government. After hearing Mr. Woodworth, it is by the Court ordered that said motion be, and the same is hereby, denied. Mr. Woodworth called John B. Martin, James McGowan, James McGrath, Andrew Furuseth, Adolph Bachman, E. Falk and T. Green, who were duly sworn and examined as witnesses on behalf of the defendant. Thereupon

the further trial hereof, after an admonition by the Court to the Jury, was continued until Friday, July 13, 1906, at 10 o'clock A. M.

At a Stated Term of the District Court of the United States for the Northern District of California, Held at the Court-room in the City and County of San Francisco, on Friday, the 13th Day of July, A. D. 1906.

Present: The Honorable John J. De Haven, Judge.

30 [Number and Title of Case.]

Minutes of Trial (Continued).

In this case, the defendant with Marshall B. Woodworth, his attorney; Benjamin L. McKinley, Assistant U. S. Attorney, and the jury sworn to try the case, being present in open Court, the trial hereof was resumed. Mr. Woodworth called Gustav Mangerson, Andrew Swanson, Harry Olsen, Philip Mendo, John Lindgren and Henry Heinz and Alfred B. Lawson, who were duly sworn and examined as witnesses on behalf of the defendant, and rested. Mr. McKinley called Thomas F. Curtis, Mrs. Abbie L. Bond, Jacob Iso and Emil Carlson, who were duly sworn and examined as witnesses on behalf of the Government in rebuttal, and rested. The case was then argued by Mr. McKinley, and Mr. Woodworth, and submitted. The Court charged the jury, who at 12 o'clock and 30 minutes P. M. retired to deliberate upon a verdict. By the Court ordered that the U. S. Marshal furnish two bailiffs, and the jurors in this case, meals at the expense of the United States. Subsequently, at 2 o'clock and 50 minutes P. M. the jurors returned into court, and upon being asked, in the presence of the defendant and his counsel, if they agreed upon a verdict, returned a written verdict, which was ordered recorded, and which verdict is as follows: "We, the jury, find Gustav Holmgren, the prisoner at the bar, guilty as charged in the
31 third count of the indictment. Recommended to the mercy of the Court. James King, Foreman." On motion of Benjamin L. McKinley, Assistant U. S. Attorney, it is ordered that the defendant be committed to the custody of the United States Marshal to await sentence. By the Court ordered that the defendant be produced in open Court on Tuesday, July 17, at 10 o'clock A. M. for sentence.

In the District Court of the United States in and for the Northern District of California.

No. 4362.

THE UNITED STATES OF AMERICA
vs.
GUSTAV HOLMGREN.

Verdict.

We, the jury, find Gustav Holmgren, the prisoner at the bar, guilty as charged in the third count of the indictment.
Recommended to the mercy of the Court.
JAMES KING, *Foreman.*

[Endorsed:] Filed July 13th, 1906, at 2 o'clock and 50 minutes P. M. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

32 At a Stated Term of the District Court of the United States for the Northern District of California, Held at the Courtroom in the City and County of San Francisco, on Wednesday, the 25th Day of July, A. D. 1906.

Present: The Honorable John J. De Haven, Judge.

No. 4362.

THE UNITED STATES OF AMERICA
vs.
GUSTAV HOLMGREN, Defendant.

Judgment on Verdict of Guilty as to Third Count of Indictment.

Benjamin L. McKinley, Assistant United States Attorney, the defendant and his counsel, Marshall D. Woodworth, came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 7th day of October, 1905, charging him with the crime of perjury; of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 13th day of July, 1906, to wit: "We, the jury, find Gustav Holmgren, the prisoner at the bar, guilty as charged in the third count of the indictment. Recommended to the mercy of the Court. James King, Foreman."
33 The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment:
That whereas, the said Gustav Holmgren, having been duly convicted in this court of the crime of perjury, as charged in the third count of the indictment—

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It is therefore ordered, adjudged and decreed that the said Gustav Holmgren be, and he is hereby, sentenced to pay a fine of three hundred (300) dollars, and to be imprisoned for the term of three (3) years: And it is further ordered that said sentence of imprisonment be executed upon the said Gustav Holmgren by imprisonment in the State Prison of the State of California, at San Quentin, Marin County, California.

JOHN J. DE HAVEN,
United States District Judge,
Northern District of California.

[Endorsed:] Filed July 25th, 1906. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

34 In the District Court of the United States in and for the Northern District of California.

No. 4362.

THE UNITED STATES
vs.
GUSTAV HOLMGREN.

Petition for Writ of Error and Order Thereon.

To the Honorable John J. De Haven, Judge of the District Court of the United States in and for the Northern District of California:

The petitioner, Gustav Holmgren, respectfully represents that heretofore, to wit, on the 25th day of July, 1906, by a final judgment of the District Court of the United States, in and for the Northern District of California, rendered and entered in a criminal action therein pending, and in which the United States is plaintiff and your petitioner defendant, it was adjudged that your petitioner was guilty of the offense of perjury; and, as a punishment thereof, your petitioner was ordered to pay a fine of three hundred ($300) dollars and to be imprisoned in the State's Prison of San Quentin for a period of three years.

That your petitioner claims a writ of error against said judgment from the United States Circuit Court of Appeals for the Ninth
35 Circuit, and in that behalf avers there is a manifest error in said judgment and in the verdict upon which the same was based, as is set out in the assignment of errors filed herewith.

Wherefore, your petitioner prays that he be allowed herein a writ of error upon said judgment rendered against him, from the United States Circuit Court of Appeals, in and for the Ninth Circuit, to the said District Court of the United States, in and for the Northern District of California; that he be awarded a supersedeas upon said judgment and all necessary process, including bail.

BERT SCHLESINGER,
MARSHALL B. WOODWORTH,
Attorneys for Petitioner.

Bert Schlesinger, Marshall B. Woodworth, Attorneys for Petitioner.

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Order Allowing Writ of Error.

The foregoing petition for a writ of error is granted; the writ of error and the supersedeas therein prayed for pending the decision upon the writ of error are allowed, and the defendant, Gustav Holmgren, is admitted to bail upon the writ of error in the sum of se-en thousand and five hundred dollars ($7,500.00).

36 The bond for costs upon the writ of error is hereby fixed at the sum of two hundred and fifty dollars.

JOHN J. DE HAVEN,
United States District Judge.

Service admitted this 9th day of August, 1906.

BENJ. L. McKINLEY,
Ass't U. S. Att'y.

[Endorsed:] Filed August 9th, 1906. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 4362.

THE UNITED STATES
vs.
GUSTAV HOLMGREN.

Assignment of Errors.

Of July Term, in the Year of our Lord One Thousand Nine Hundred and Six.

Afterwards, to wit, on the 9th day of August, A. D. 1906, in the same term, before the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, in the State and Northern District of California, comes the said Gustav Holmgren, by Bert Schlesinger and Marshall B.

37 Woodworth, his counsel, and says that in the record of proceedings in the action of the United States vs. Gustav Holmgren, No. 4362, in the District Court of the United States, in and for the Northern District of California, there is manifest error in this, to wit:

1. That the said District Court committed manifest error in overruling the demurrer of the said defendant to the third count of the indictment in said action; which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

2. That the District Court committed manifest error in sustaining the objections of the United States Attorney to the introduc-

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tion in evidence of the document purporting to be the application and affidavit of the witness Frank Werta to the Local Board of Inspectors; which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

3. That the said District Court committed manifest error in overruling the objection of the attorney for the defendant to the paper, instrument and document marked "U. S. Exhibit No. 1," and purporting to be a certified copy of the Record of Judgment of Naturalization of one Frank Werta; which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

38 4. That the said District Court committed manifest error in overruling the defendant's objection to the introduction in evidence of the paper, instrument and document marked "U. S. Exhibit No. 2," and purporting to be a correct transcript of a certain "Affidavit of Witness" as the same appeared in Book "A," page 288, of the Acts of Naturalization of the Superior Court of the State of California, in and for the City and County of San Francisco, viz: the record of one Frank Werta; which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

5. That the said District Court committed manifest error in sustaining the objection of the United States to the following question put by the attorney for the defendant to the witness, Thomas J. Quinn, viz.: "Has it ever happened that you made mistakes in entries or dockets or in the minutes?" which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

6. That the said District Court committed manifest error in sustaining the objection of the United States Attorney to the following question put by the defendant's attorney to the witness Thomas J. Quinn, viz.: "Has it ever happened that you signed these blanks when afterwards they were canceled by the Court, or for

39 some reason not used?" which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

7. That the said District Court committed manifest error in sustaining the objection of the United States Attorney to the following question put by the attorney for the defendant to the witness Thomas J. Quinn, viz.: "Has it ever happened that you signed a number of these blanks before using them, when you had a number of these cases?" which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

8. That the said District Court committed manifest error in denying the motion of the attorney for the defendant to instruct the jury to acquit the defendant; which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred *up* him by law.

9. That the said District Court committed manifest error in re-

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fusing to give to the jury the following instructions (No. 1) requested by the defendant, viz.: "I charge you that every person accused of crime is presumed to be innocent until his guilt is established beyond reasonable doubt. The law presumes him to be innocent, and this presumption goes with him all through the trial, and into the jury-room, and when you retire to consider your
40 verdict, and remains with him until after full consideration of the case to determine the question of his guilt. This is an established right of the defendant, and must be given to the defendant in good faith by each and every one of you." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

10. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 2) requested by the defendant, viz.: "I charge you that it is not necessary for the defendant to prove his innocence, but it is absolutely necessary for the prosecution to prove his guilt to a moral certainty beyond all reasonable doubt." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

11. That the said District Court committed manifest error in refusing to give to the jury the following instructions (No. 4) requested by the defendant, viz.: "I charge you that in every crime or public offense there must exist a union or joint co-operation of act and intent. The intent must be a criminal intent. Hence an act done may be wrong and injurious, but if it is not done with a criminal intent, it is not a crime, and cannot be made a basis
41 of the conviction, and unless the evidence satisfies you beyond a reasonable doubt that the defendant had a criminal intent in the doing of the particular acts complained of, it will be your duty to find him not guilty." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

12. That the said District Court committed manifest error in refusing to give to the jury the following instructions (No. 5) requested by the defendant, viz.: "I charge you that you cannot convict the defendant upon mere suspicions, however strong they may be. The defendant can only be convicted upon evidence, and only when the evidence is such as establishes his guilt to a moral certainty and beyond all reasonable doubt." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

13. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 8) requested by the defendant, viz.: "I charge you that although you should believe from the evidence that the defendant testified falsely in the proceedings referred — in the indictment, nevertheless you cannot find him guilty unless you further find from the evidence adduced here that such false testimony was given by him
42 corruptly. In other words, the mere fact that the defendant gave false testimony is not alone sufficient to authorize a

conviction." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

14. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 9) requested by the defendant, viz: "I charge you that to constitute the crime of perjury, the testimony or statement must not only be false, but the party making the same must himself believe it to be false. In other words, the defendant must know that he was giving false testimony." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation *to* the rights conferred upon him by law.

15. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 13) requested by the defendant, viz.: "I charge you that the defendant cannot be convicted of perjury unless he wilfully and corruptly gave false testimony. If he swore honestly to a fact or belief, with probable cause according to his own lights, to the best of his belief, he is not guilty of perjury though his oath was really untrue." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

43 16. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 14) requested by the defendant, viz: "I charge you that perjury can only be imputed upon full knowledge of the falsity of the testimony, and cannot be predicated where willfulness, corruption and malice are not manifest. A misconception or a mistake is not enough to warrant a conviction of perjury." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

17. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 15) requested by the defendant, viz.: "I charge you that the taking of a false oath must be both willful and corrupt. Testifying falsely by mistake, however negligently, inconsiderately or recklessly, is not perjury." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

18. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 17) requested by the defendant, viz.: "It is not incumbent upon the defendant to prove his innocence, nor is it incumbent upon him to explain suspicious circumstances even if any can be
44 said to exist. The burden of the proof never shifts to him to explain anything. In case of this character he has a right to stand mute and demand that the government make the case against him beyond a reasonable doubt. You must indulge in no presumption against him because of his failure to take the stand. There is nothing in these circumstances to warrant you in drawing any inference against him. It is elementary law that the defendant

is not required to take the witness stand, and that no presumption can be indulged in against him by reason of his failure to testify in the case." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

19. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 18) requested by the defendant, viz.: "I charge you that the evidence in this case is entirely insufficient to warrant a verdict of guilty, and hence your verdict will be not guilty." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

20. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 19) requested by the defendant, viz.: "I advise you to return a verdict of not guilty for the reason that the evidence is insufficient to warrant a verdict of guilty against the defendant." Which ruling is to be the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

21. That the said District Court committed manifest error in refusing to give to the jury the following instruction (No. 21) requested by the defendant, viz.: "I hereby instruct you that it is the right of the defendant not to take the stand and to testify in his own behalf, but that he may rely solely and entirely upon the government proving his guilt beyond all reasonable doubt." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

22. That the said District Court committed manifest error in refusing to give to the jury the following instruction (Additional Instruction No. 2) requested by the defendant, viz.: "I charge you that if a person comes to the United States with the intention of becoming a citizen and after that sails on American vessels from the United States and returning to the United States, his abode on such vessels is a residence within the United States. In other words, his being on American vessels after arriving in the United States, with the intention of becoming a citizen of the United States, constitutes a residence within the United States." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

23. That the said District Court committed manifest error in refusing to give to the jury the following instruction (Additional Instruction No. 3) requested by the defendant, viz.: "I charge you that if you believe the testimony of the witness Frank Werta, then that said witness, was an accomplice in crime with the defendant's aid. I instruct you that before you can convict said defendant the testimony of the witness Frank Werta should be corroborated by the testimony of at least one witness or strong corroborative circumstances." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

24. That the said District Court committed manifest error in refusing to give to the jury the following instructions (Additional Instructions No. 6) requested by the defendant, viz.: "I instruct you that the defendant's plea of not guilty is a complete denial of the charge made against him and puts in issue all the evidence submitted against him, if you should find that any has been submitted against him." Which ruling is to the great detriment, injury
47 and prejudice of your petitioner and in violation of the rights conferred upon him by law.

25. That the said District Court committed manifest error in giving to the jury the following charge, viz: "The defendant is presumed to be innocent and he is entitled to the benefit of this presumption as evidence in his favor; and you will not be justified in returning a verdict of guilty unless you are satisfied, beyond a reasonable doubt, after a consideration of all the evidence, that he is guilty." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

26. That the said District Court committed manifest error in giving to the jury the following charge, viz: "If you find from the evidence beyond a reasonable doubt that the defendant here was duly sworn in the proceedings referred to, and took oath to testify as a witness in that proceedings as charged in the indictment, and he, after having been so sworn and having taken such oath, willfully and knowingly testified falsely that the said Frank Werta had resided in the United States continuously for a period of five years immediately prior to the time of the said hearing of the application, and had resided in the United States continuously during the three years next—preceding his arrival at the age of twenty-one
48 years, and had continued from his said arriving at said age until the time of said hearing to so reside in the United States, and that he, the said defendant, had been acquainted with him, and had known the said Werta during the said five years immediately preceding such hearing, it will be your duty to bring in a verdict of guilty, that is, if you find that the testimony was knowingly false." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

27. That the said District Court committed manifest error in giving to the jury the following charge, viz: "The defendant has not been sworn as a witness in this case, and in relation to that I read you the following as the law that is to govern you in considering that fact:

That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the United States, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him." Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

28. That the said District Court committed manifest error in permitting the jury upon retiring to deliberate on a verdict, to take with them, and keep during all their deliberation in the jury-room, the indictment in the case, upon the back of which was endorsed the verdict of guilty of another jury upon a previous trial had on the third count of said indictment. Which action and conduct of the Court was to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

29. That the said District Court committed manifest error in denying, refusing and overruling the defendant's motion for a new trial herein. Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

30. That the said District Court committed manifest error in denying, refusing and overruling the defendant's motion in arrest of judgment. Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

31. That the said District Court committed manifest error in sentencing the defendant to imprisonment in the State Prison of the State of California at San Quentin for the period of three years and imposing a fine of three hundred dollars, which judgment is to the great detriment, injury and prejudice of your petitioner and contrary to and in violation of the rights conferred upon him by law.

32. That the defendant was not convicted herein by due process of law. All of which is to the great prejudice, damage and injury of his substantial rights.

33. That defendant was deprived of a fair trial by the misconduct of the Court and its officials in permitting the jury upon retiring to deliberate on the verdict to take with them and keep with them during all their deliberations in the jury-room, the indictment in the case, upon the back of which was endorsed the verdict of guilty of another jury upon a previous trial had on the third count of the indictment, which misconduct on the part of the Court and its officials and of the jury is to the great prejudice, damage and injury of defendant's substantial rights.

Whereas, by the law of the land said judgment ought to be given for said Gustav Holmgren, plaintiff in error, and against the United States, defendant in error, and the said plaintiff in error the said Gustav Holmgren, prays the judgment to be reversed, annulled and altogether held for nothing, and that he be restored to all things which he hath lost by occasion of the said judgment.

BERT SCHLESINGER AND
MARSHALL B. WOODWORTH,
Attorneys for Defendant.

Service admitted this 9th day of August, 1906.

BENJ. L. McKINLEY,
Assistant U. S. Attorney.

[Endorsed:] Filed August 9th, 1906. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 4362.

THE UNITED STATES
vs.
GUSTAV HOLMGREN.

Bill of Exceptions.

Be it remembered that heretofore, on the 12th day of July, A. D. 1906, the above-entitled action came on regularly for trial before said United States District Court and a jury impaneled to try the same. The Assistant United States Attorney Benjamin L. McKinley and the Special Assistant United States Attorney Frank Duryea represented the United States, and Marshall B. Woodworth, Esq., represented the defendant.

The respective parties introduced evidence, oral and documentary upon the trial of the cause, and after argument of counsel, the Court delivered its charge to the jury, and said action was thereupon
52 submitted to the jury for decision; and after deliberation the jury returned a verdict against said defendant, finding him guilty as charged in the third count in the indictment on file in said action.

That to said verdict against said defendant, the defendant then and there duly excepted at the time of its rendition and at the time of its entry by the clerk of the Court.

That in said action the following objections were made by the defendant, and the following rulings were made by the said Court in respect thereto, and the following exceptions were taken and served by said defendant upon said rulings.

That the following constitutes all the evidence in the cause taken by said District Court at the trial thereof, and the rulings hereinafter stated were made by said Court, and the objections and exceptions hereinafter specified were made and taken by the defendant as hereinafter stated and the exceptions reserved in the manner hereinafter set forth.

FRANK WERTA, called for the United States, sworn.

Mr. MCKINLEY:

Q. Where do you live, Mr. Werta?
A. 2682B Folsom street.
Q. San Francisco?
A. Yes, sir.
Q. Where were you born?

A. Finland.
Q. What year?
A. 1879.
53 Q. When did you first come to the United States?
A. 1899.
Q. Where to?
A. Mobile.
Q. In the State of Alabama?
A. Yes, sir.
Q. What ship did you come on?
A. The "Harbinger."
Q. That is a Russian ship?
A. A Finn ship.
Q. You came as a member of the crew to Mobile? You were a sailor on that ship?
A. Yes, sir.
Q. And had signed the ship's articles for a roundtrip voyage; that is right, is it?
A. Yes, sir.
Q. What was the home port of the "Harbinger" at that time? Where did you join the "Harbinger"?
A. At London.
Q. You had come from Finland to London and there joined the "Harbinger"?
A. Yes, sir.
Q. How long did you stay at Mobile?
A. About three months.
Q. Did you stay with the ship all the time?
A. Yes, sir.
Q. You were connected with that ship?
A. Yes, sir.
Q. Therefore, when you came to Mobile you intended to leave with that ship and did leave with that ship. Is that right?
A. Yes, sir.
Q. You slept on board that ship?
54 A. Yes, sir.
Q. The ship was your home at the time she was at Mobile?
A. Yes sir.
Q. Were you discharging and taking on cargo there?
A. Yes, sir.
Q. You did not come to the United States to live there in 1899? You went away again?
A. Yes, sir.
Q. Did you see Gustav Holmgren at Mobile at the time?
A. I don't remember.
Q. As a matter of fact don't you know you did not see him?

Mr. WOODWORTH: The witness has answered the question.
Mr. MCKINLEY: I submit I can handle the witness myself, if your Honor please.
Mr. WOODWORTH: The question is leading.
The COURT: I think the question is proper.

Mr. McKINLEY:

Q. You did not see him there?
A. I don't know if I did or not.
Q. You were never introduced to him there?
A. No, sir.
Q. If you ever saw him there you did not know it? You left Mobile after some two or three months, is that right?
A. Yes, sir.
55 Q. Where did you go then?
A. To Buenos Ayres.
Q. Went away to some foreign country?
A. Yes, sir.
Q. When did you come to the United States to stay there?
A. In 1901.
Q. On what ship?
A. The "Harbinger."
Q. On the same ship you were on at Mobile?
A. Yes sir.
Q. How long were you on that ship altogether?
A. About three years.
Q. What time in 1901 was it that you came to the United States and to what place in the United States did you come?
A. To San Francisco.
Q. When?
A. February.
Q. Can you give me the date?
A. I don't remember the date exactly. The "Rio de Janiero" sank the same date.
Q. That would be during the month of February, 1901, would it not?
A. Yes, sir.
Q. As a matter of fact, it was February 22, 1901.

Mr. WOODWORTH: Let the witness testify.
The COURT: He says he does not know the date.
Mr. WOODWORTH: I desire to enter an objection to the prompting of the District Attorney.
56 The COURT: I suppose there will be no question during this trial as to the date when the "Rio" sank. It is a matter of common notoriety.
Mr. WOODWORTH: I shall make no questions about it, but I do object to the method of the District Attorney.
The COURT: I see no objection to it, except that it is unnecessary to ask questions about a thing that is perfectly plain.

Mr. McKINLEY:

Q. When did you leave the "Harbinger"?
A. About two weeks after.
Q. You deserted the "Harbinger" and stayed here in San Francisco;—that is right, is it?

Mr. WOODWORTH: I object to the question as leading.

The COURT: I overrule the objection.
Mr. WOODWORTH: I will take an exception.

A. Yes, sir.

Mr. MCKINLEY:

Q. Where did you go after leaving the "Harbinger"?
A. No. 6 Howard Street.
Q. Who was the proprietor of that place?
57 A. Franz Johansen.
Q. Is that F. O. Johansen?
A. Yes, sir.
Q. Is that a boarding-house?
A. Yes, sir.
Q. Do you know a man by the name of John Joke?
A. Yes, sir.
Q. Was he on board of the "Harbinger" with you?
A. Yes, sir.
Q. Where did he join?
A. At South Shields.
Q. That is in England, is it not?
A. Yes, sir.
Q. How long was he aboard the vessel with you?
A. About 18 months.
Q. Did he come to San Francisco with the "Harbinger"?
A. Yes, sir.
Q. Did he leave the vessel at the time you did?
A. About that time, some days afterwards.
Q. Around about the same time, is that so?
A. Yes, sir.
Q. Do you know where he went?
A. To the same place.
Q. When did you first meet the defendant Gustav Holmgren, if you ever met him?
A. About three months afterwards.
Q. Three months after you came to this country?
A. Yes, sir.
58 Q. That would be sometime about the month of May or June, 1901?
A. Yes, sir.
Q. As near as you can place it?
A. Yes, sir.
Q. Who, if anyone, introduced you to Gustav Holmgren?
A. Albert Kolehmaien.
Q. He introduced you to Gustav Holmgren?
A. Yes, sir.
Q. And that was about three months or thereabouts after you first came to San Francisco?
A. Yes, sir.
Q. Now, were you naturalized in the Superior Court of the City and County of San Francisco?
A. Yes, sir.
Q. About when?

A. 1903.

Q. Do you remember the month?

A. September.

Q. I will ask you to state whether or not Gustav Holmgren, the defendant here, was one of the witnesses who was present and testified on your application for naturalization?

Mr. WOODWORTH: I object to the question as incompetent and irrelevant and the best evidence is the record of the document itself.

The COURT: I overrule the objection. It is a preliminary question.

59 Mr. WOODWORTH: I will take an exception.

Mr. MCKINLEY: Tell me whether the defendant Holmgren was a witness for you in your naturalization case?

A. Yes, sir.

Q. He was sworn, was he?

A. I think so.

Q. He testified for you, did he? He gave the testimony about you before the Court there?

A. Yes, sir.

Q. Did you hear anything that he said?

A. I don't remember. I don't understand exactly what you mean.

Q. I will tell you. Did you hear him state or say anything about how long he had known you in this country?

A. Yes, sir.

Mr. WOODWORTH: I object to the question upon the ground that the proper foundation has not been laid. There is no proof that any oath was administered to the witness, and we are entitled to the record or some showing where the record is and not be forced to rely on the memory of the witness of something that occurred six years ago.

The COURT: I overrule the objection.

Mr. WOODWORTH: I will take an exception.

60 Mr. MCKINLEY:

Q. What did he say about that?

A. He said he knew me that long.

Q. How long?

A. About seven years.

Q. That was not so, was it. You had not known him over seven years?

A. I don't know him that long.

Q. Now, Mr. Werta, when you were admitted as a citizen before that court you got a paper, didn't you, a citizenship paper?

A. Yes, sir.

Q. What became of that paper—what was done with it?

Mr. WOODWORTH: The same objection as before. We are entitled to the production of the records.

The COURT: I overrule the objection.

Mr. WOODWORTH: I will take an exception.

Mr. McKINLEY:

Q. Where is that paper? What did you do with it?
A. I gave it to Gustav Holmgren.
Q. When?
—. About last year.
Q. Can you fix the date last year that you gave that to Holmgren?
A. About the last of May or the early part of June, last year.

61 Q. How did you come to give your naturalization papers to Holmgren?
A. He wanted to see my papers.
Q. And asked you for them?
A. Yes, sir.
Q. And you gave them to him?
A. Yes, sir.
Q. You have never seen them since?
A. No, sir.
Q. Who was your other witness besides Gustav Holmgren?

Mr. WOODWORTH: Objected to as having nothing to do with the case.

The COURT: I overrule the objection.

Mr. WOODWORTH: I will take an exception.

A. Frank Johnson.

Mr. McKINLEY:

Q. Did you ever have any conversation with Gustav Holmgren, the defendant, with regard to leaving San Francisco for any cause?
A. Yes, sir.

Mr. WOODWORTH: Kindly fix the time and place.

Mr. McKINLEY:

Q. During last year, 1905.
A. Yes, sir.
Q. Tell me when those conversations took place as near as you can place them?

62 A. He told me that several times.

Q. About when? Was it during the months of April, May, June, July, or when?
A. About the latter part of May or the first part of June.
Q. Tell me what Holmgren said to you?
A. He said, "Better you go and leave the country. You have got bad papers."
Q. How many times in all did he say that to you more than once?
A. Yes, sir.
Q. More than twice?
A. Yes, sir.
Q. More than three times?
A. I don't remember.

Q. He did tell you you had better leave the country because you had bad papers?
A. Yes, sir.
Q. Did he say anything about an investigation being made of those papers, by some one from Washington?

Mr. WOODWORTH: I object to the question as leading.
The COURT: I overrule the objection.
Mr. WOODWORTH: I will take an exception.

A. Yes, sir.

Mr. MCKINLEY:

Q. What did he say about that?
63 A. That a fellow was here from Washington in San Francisco, to look after the papers.
Q. Did he or not say that he was afraid that you would get them into trouble?

Mr. WOODWORTH: I object to the question as leading.
The COURT: I overrule the objection.
Mr. WOODWORTH: We will take an exception.

A. Yes, sir.

Mr. MCKINLEY:

Q. Let me see if I have got this right he said, "There is a man out here from Washington digging up citizen papers and you had better leave the country, you have got bad papers and you will get us all into trouble"; is that right or wrong?
A. He told me to leave the town and go away to the country.
Q. Did you leave the town?
A. Yes, sir.
Q. Did Holmgren make you any promise about taking care of your family while you should leave town?
A. Yes, sir; he told me once he would give some money to my family.
Q. What family have you?

64 Mr. WOODWORTH: Objected to as immaterial.
Mr. MCKINLEY: It is not very material.

Q. Did you leave town?
A. Yes, sir.
Q. Where did you go to?
A. To Tuolumne county.
Q. How long did you stay?
A. Two or three weeks.
Q. You were brought back from there by the Secret Service officers?
A. Yes, sir.
Q. Did you pay any money to your witnesses or either of them, for appearing as witnesses in your case?
A. Yes, sir, I paid something to Frank Johnson.

Q. How much?
A. Forty-four dollars, but I did not pay anything to Holmgren.
Q. You paid it to Frank Johnson?
A. Yes, sir.
Q. Did you ask Mr. Holmgren to go up there and swear to these things as your witnesses?
A. No, sir.
Q. You do not know who did ask him, if anybody did?
A. No, sir.
Q. The first thing you knew about it then, that he was to be your witness, was when you went up to court and saw him?
A. Yes, sir.
65 Q. And he held up his hand and said this about knowing you seven years in the country?

Mr. WOODWORTH: There is no such evidence in the case.
The COURT: That is not a proper way to make an objection, Mr. Woodworth.
Mr. WOODWORTH: I desire to except as not being the evidence.
The COURT: You can except to the statement.
Mr. WOODWORTH: And as gross error.
Mr. MCKINLEY: That is all.

Cross-examination.

By Mr. WOODWORTH:

Q. You wanted to become a citizen, did you not, of this country?
A. Yes, sir.
Q. Can you remember just what took place in the court now, some three years ago? You cannot remember just what took place in the court?
Mr. MCKINLEY: Do you understand the question?
A. No.

Mr. WOODWORTH:

Q. Do you remember what took place in the court when you wanted to become a citizen? You cannot remember now
66 what took place, can you?
A. I don't understand you.
Q. You went to the court to become a citizen?
A. Yes, sir.
Q. Who went with you at the time?
A. Frank Johnson went with me, and I met Mr. Holmgren up there.
Q. He did not go with you?
A. No, sir.

Mr. MCKINLEY: I will ask the Court to allow the reporter to read that. Probably the jury did not understand that question and answer.
Mr. WOODWORTH: I think they understood it.

Q. Did Mr. Holmgren ask you for a cent of money?

A. No, sir.
Q. You did not pay him any money?
A. No, sir.
Q. Will you kindly tell the jury just what the questions were that the Judge asked you at that time when you went to the court. Do you remember what questions he asked you?
A. I don't remember all that.
67 Q. Do you remember what the clerk said to you when you were sworn, when you took an oath? Do you remember what the clerk said?
A. Yes, sir.
Q. What did he say?
A. He asked how long my witnesses knew me.
Q. That is what the clerk said?
A. Yes, sir.
Q. Do you mean to say that the clerk asked you the questions or did the Judge?
A. I don't know.
Q. You don't remember just what took place, do you? You cannot tell now just what took place some three years ago in that court room?
A. No, sir.
Q. You cannot tell whether Mr. Holmgren was sworn at all?
A. Yes, sir, I remember that.
Q. You remember what?
A. That they swore him.
Q. Were you sworn?
A. I think so.
Q. You are not sure about that. What was the first question that the judge asked you?
A. I don't remember.
Q. What was the last question he asked you?
A. I don't remember.
Q. Do you remember whether you were sworn in the courtroom or in the clerk's office?
68 A. I don't remember that.
Q. You do not remember that?
A. No, sir.
Q. Can you remember what the judge's name was?
A. No, sir.
Q. Can you remember what the clerk's name was?
A. No, sir.
Q. You cannot say now whether the clerk swore you or not?
A. No, sir.
Q. Or whether he swore Johnsen?
A. No, sir.
Q. Or whether he swore Holmgren?
A. No, sir.
Q. Did you apply to the Board of Local Inspectors here, for the purpose of getting a license?

Mr. McKINLEY: I object to the question as incompetent, irrele-

vant and immaterial; it has nothing to do with the case at all and is not proper cross-examination.

The COURT: I overrule the objection.

Mr. WOODWORTH:

Q. Do you apply to the Local Board of Inspectors for the purpose of becoming a second mate?

A. Yes, sir.

Q. Did you there write out a statement and swear to it at the time?

69 Mr. MCKINLEY: I think that is objectionable.

The COURT: It is a preliminary question.

A. I do not understand.

Mr. WOODWORTH:

Q. Is this your signature here (handing a paper to the witness)?

A. Yes, sir.

Q. Did you write this paper out yourself?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. All of it?

A. Yes, sir.

Q. Excepting the signature of the officer and the other gentleman?

A. Yes, sir.

Q. And did you make the statement there of your service at sea?

A. Yes, sir.

Q. Did you say you had been to sea for eleven years as a seaman?

Mr. MCKINLEY: One moment.

The COURT: Do you desire to introduce that paper in evidence?

Mr. WOODWORTH: Yes.

The COURT: Let me see it.

Mr. WOODWORTH: It will be followed by other proof. He stated here he came on some Finnish vessel as I understood, and I desire to impeach his testimony.

70 The COURT: What is the objection to the paper. What is the date of that paper?

Mr. MCKINLEY: April 5th, 1905, and sworn to May 9th, 1905, apparently. This is objected to as incompetent, irrelevant and immaterial, as not responsive to any issue in the case at all and as not proper cross-examination of this witness.

The COURT: On what do you base the claim it is competent?

Mr. WOODWORTH: To impeach the testimony of the witness.

The COURT: In what way?

Mr. WOODWORTH: He states he came here on a Finnish vessel. I propose to show that he has rendered service on other vessels. It is offered for the purpose of impeaching the testimony of the witness showing he has made different statements to the one in this document and the one on the stand.

Mr. McKINLEY: It is irrelevant -nd incompetent for that purpose. It does not and cannot impeach the witness.

The COURT: It is a very singular thing. The counsel for the defendant does not state wherein it impeaches the testimony
71 of the witness and the prosecuting attorney, for some reason does not desire to say in what respect it does not.

Mr. WOODWORTH: I will be frank with the Court. I desire to show that this defendant has made different statements at different times and I can readily show that he has.

The COURT: What is the particular ground on which you object to this?

Mr. McKINLEY: I do not think it has anything to do with the case.

Mr. WOODWORTH: I submit it has.

Mr. McKINLEY: It is a list of service on vessels not in any way connected with the case at all; no contradiction of anything that the witness has said on direct examination.

The COURT: I do not see that it contradicts the testimony of the witness in any respect. I do not understand just why any objection should be made to the document. The witness here states—this statement is made on May 19th, 1905—that he served on certain American vessels, the steamer "Westport," the "Prentis," the "Albion River," the "Phœnix," the "Fulton," the "Gualala" and the "Rival." The time would make three years and a half.

72 Mr. McKINLEY: I withdraw the objection.

The COURT: The witness testified he did not come to this port until February 22d, 1901. This oath was taken more than four years after that date, so that it could be true that he did not come here until the 22d of February, 1901, and that he could have served on all these steamers just as he states here?

Mr. WOODWORTH: It could be true but might not be true.

The COURT: I will sustain the objection to the paper.

Mr. WOODWORTH: The District Attorney withdrew it.

The COURT: He does when he finds the document has no bearings on the case, and there is no occasion for objecting to it.

Mr. WOODWORTH: I offer the document, if your Honor please.

The COURT: I rule it out because it does not tend in any degree to contradict the testimony of the witness. It might as well be ruled out now as to argue it before the jury.

Mr. WOODWORTH: We think it does and it will impeach his testimony in a very important degree. That is the purpose of offering the documnet.

73 The COURT: I do not see how it does.

Mr. WOODWORTH: I will take an exception.

Q. Now, Mr. Werta, did you ever serve on the steamer "Westport"?

A. Yes, sir.

Q. How long did you serve on her?

A. I don't remember exactly; about four months.

Q. Did you ever serve on the steamer "Prentis"?

A. Yes, sir.

Q. How long were you on her?
A. About eleven months.
Q. Did you ever serve on the steamer "Albion River"?
A. Yes, sir.
Q. For what period of time?
A. Before she went ashore.
Q. Did you ever serve on the steamer "Phoenix"?
A. Yes, sir.
Q. For how long a period of time?
A. About six or seven times; no, about four or five times.
Q. How long a time altogether did you serve on her?
A. About two years.
Q. But you can recall it is about two years?
A. No, I don't say that.
Q. What do you say?
A. I don't remember exactly.
Q. Was it one year?

74 Mr. McKINLEY: It seems to me, if your Honor please, this is immaterial.

The COURT: He can ask this witness how many vessels he served on and the length of time he served, and if he can show, although the witness has stated in that paper he only served three years and a half, that he served fifteen years, he can do it.

Mr. WOODWORTH:

Q. How long did you remain on the "Phoenix"?
A. I don't remember exactly.
Q. About—not exactly; I don't want to know the day and month?
A. About 17 months and a half.
Q. Do you know the steamer "Fulton"?
A. Yes, sir.
Q. How long did you serve on her?
A. I don't remember exactly.
Q. How long, about?
A. About three or four months.
Q. Do you remember the steamer "Gualala"?
A. Yes, sir.
Q. How long were you on her?
A. About a month.
Q. The steamer "Rival"?
A. Yes, sir.
Q. Were you on her?
A. Yes, sir.
Q. All these were American vessels?
75 A. Yes, sir.
Q. Plying between here and other countries?
A. No, sir, on the coast.
Q. What other American vessels did you serve on here?
A. On schooners.
Q. For how long a time?

A. I don't remember how long a time.
Q. About. Have you a good memory or a poor memory?

Mr. McKINLEY: I object to the question.
Mr. WOODWORTH: That is obvious that he has a poor memory.

Q. How long have you served at sea?
A. About eleven years.
Q. What other American vessels did you serve on besides these to which I have called your attention?
A. I cannot remember.
Q. How is it you can remember these ones to which I have called your attention and you cannot remember others?

Mr. McKINLEY: I object to the question as incompetent, irrelevant, immaterial and not proper cross-examination.
The COURT: I overrule the objection.

A. I do not understand the question.
76 Mr. WOODWORTH: Why cannot you remember the others?
The COURT: He says he does not understand you. It is very evident he does not. He has an imperfect understanding of the language.

Mr. WOODWORTH:

Q. Why cannot you tell us the names of other American vessels that you served on and can remember these that I have called your attention to?
A. I served on a couple of schooners.
Q. Is that all?
A. Yes, sir.
Q. Did you serve on any other American vessels?
A. I might have about two or three days.
Q. When you went up to the Court did the Judge ask you how long you had been here; do you remember that?
A. No, sir.
Q. He did not ask you how long you had been here; do you remember that?
A. No, sir.
Q. You are sure about that?
A. Yes, sir.
Mr. McKINLEY: Do you understand that question?
A. I don't understand.

Mr. WOODWORTH:

Q. The Judge did not ask you how long you had been here?
A. Yes, sir.
77 Q. You remember that now?
A. Yes, sir.
Q. When did you tell him.

Mr. McKINLEY: It seems to me this is not cross-examination. However, let it go.

Mr. WOODWORTH:

Q. What did you tell the Judge? Do you remember what you told the Judge?

A. Frank Johnson told him seven years.

Q. I am not asking you what Frank Johnson told him. What did you tell the Judge?

A. Frank Johnson said seven years.

Q. What did you tell the judge? Did you not tell the judge anything?

A. I don't think so.

Q. You did not say anything to the Judge? Do you mean that?

A. I don't remember exactly; I know Frank Johnson said seven years.

Q. Did the Judge ask you how long you had been in the United States, in this country; do you understand that?

A. Yes, sir, he said seven years.

Q. Did you say seven years?

A. Frank Johnson did.

Q. I am not asking you about Frank Johnson.

The COURT: A good deal would depend on how this man
78 was naturalized. If he was naturalized as a minor he might be asked the question. Then they might have asked him how old he was when he came to the country.

Mr. WOODWORTH:

Q. Do you remember whether the Judge asked you any questions or not?

A. Yes, sir, he asked me some questions.

Q. Did he ask you how long you had been here in this country?

A. Yes, sir, and Frank Johnson told him seven years.

Q. I am asking you what you told the Judge. Did the Judge ask you how long you had been in the United States? Do you understand that question?

A. Yes, sir.

Q. Did you answer that question? Do you remember whether you answered the question at all?

A. I did not understand English at that time.

Q. You did not understand English at that time?

A. I did not understand very much.

Q. You did not understand what was going on at that time?

A. Not much.

Q. And that was some three years ago?

A. Yes, sir.

Q. Have you ever been arrested for perjury committed at that time?

A. No, sir.

Q. You never have been arrested?

79 A. No sir.

Q. Have you been promised by Mr. Taylor or the officer that they would not prosecute you if you would testify here?

A. No sir.

Q. What did they tell you?
A. They did not tell me nothing.
Q. Did they ask you to be a witness?
A. No, sir.
Q. Never asked you to be a witness?
A. No, sir.
Q. How did you come to this courtroom?
Mr. McKinley: Did you understand the questions asked you?
A. I don't understand lots of them.

Mr. Woodworth:

Q. Did you understand my last question?
A. About the Court—Taylor arrested me.
Q. What did he tell you about not putting you in jail?
A. Nothing. He arrested me and asked me what time I came to this count-y.
Q. I ask you this question: did any public official promise you that they would not prosecute you if you testified for the Government?
A. I don't understand that.
Q. At any rate you are not in jail now?
80 A. No, sir.
Q. And there is no charge against you? You have not been arrested?
A. I have been five months in jail.
Q. You are not in jail now?
A. No, sir; I got a bond.
Q. Is there any charge pending against you?
A. I don't know.
Q. Is it not a fact that you are a witness here for the Government, and that you were put in jail as a detained witness for the Government? (Addressing the Assistant United States Attorney.) You will concede that is true?
Mr. McKinley: I will concede whatever the records of the Court show.
Mr. Woodworth: The records show that.
Q. Did you say that the defendant came to your place or came to you and took your paper?
A. Who?
Q. Mr. Holmgren?
A. I did not say that.
Q. What did you say?
A. He asked me for my papers.
Q. Did you give them to him?
A. Yes, sir.
Q. Is it not a fact that you went to him yourself and said "You keep my papers; you take care of them for me"?
81 A. No, sir; he asked me for my papers.
Q. I want to ask you whether you know these gentlemen? Do you know E. Falk, a sailor on the "Phoenix" with you?
A. Yes, sir.

Q. And Adolp Backman also on the "Phoenix" with you?
A. I don't remember.
Q. Do you know Gus Magnussen?
A. No, sir.
Q. Do you remember L. T. Green?
A. I don't remember him.
Q. You cannot remember the names of the men who were on these vessels with you?
A. No, sir.

M. M. DAVIS, called for the United States, sworn.

Mr. MCKINLEY:

Q. Mr. Davis, do you reside in San Francisco?
A. Yes, sir.
Q. You are the chief deputy County Clerk in the City and County of San Francisco?
A. Yes, sir.
Q. And as such Chief Deputy County Clerk, had you the custody of the naturalization records of the City and County of San Francisco in the Superior Court?
A. Yes, sir.
Q. Did you have such an official record of naturalization in the City and County of San Francisco, known as Book "A" of Naturalization?
A. Yes, sir.
82 Q. What has become of that book at the present time?
A. It was destroyed by fire.
Q. That is, the fire that destroyed the records in the City Hall about the 18th or 19th of April, 1906, is that right?
A. Destroyed on the 18th of April, 1906, in the fire.
Q. That book was destroyed by fire on the 18th of April, 1906?
A. Yes, sir.

Cross-examination.

Mr. WOODWORTH:

Q. Have you looked for that particular book since the earthquake and fire?
A. I made a search for all books that remained in our office after the fire and was not able to find any.

THOMAS F. O'NEILL, called for the United States, sworn.

Mr. MCKINLEY:

Q. You are the Sheriff of the City and County of San Francisco?
A. Yes, sir.
Q. On the 31st day of May, 1906, you were a deputy County Clerk in the City and County of San Francisco, were you not?
A. Yes, sir.

Q. I show you what purports to be a certified copy of the record of judgment of naturalization of one Frank Werta, an alien,
83 and ask you to state whether or not that is a certified copy of the act of naturalization of Frank Werta made out by yourself, that is a certificate made by yourself?

Mr. WOODWORTH: Before he answers let me see that.

A. Yes, sir, that is my signature.

Mr. MCKINLEY:

Q. That is a certified copy. You took that copy from the book in which the judgment appears, and that is a correct and exact copy of it?

A. Yes, sir.

Q. The seal of the Superior Court is attached?

A. Yes, sir.

Mr. MCKINLEY: I now offer the certified copy of the judgment of naturalization of Frank Werta in Department Three on the 21st of September, 1903, in evidence.

Mr. WOODWORTH: I object that the proper foundation has not been laid, and also that it is incompetent, irrelevant and immaterial.

The COURT: I overrule the objection.

Mr. WOODWORTH: I will take an exception.

(The document is marked United States Exhibit No. 1 and is as follows:)

84 UNITED STATES EXHIBIT NO. 1.

No. 288

Certified Copy of Act of Naturalization.

In the Superior Court of the State of California in and for the City and County of San Francisco.

Present: Honorable Frank H. Kerrigan, Judge.

Department No. 3. In Open Court, this 21st day of Sept. 1903.

In the Matter of the Application of FRANK WERTA, 24½ Perry St., An Alien, to Become a Citizen of the United States of America.

Be it remembered, that on the 21st day of Sept. 1903, Frank Werta, an applicant to become a citizen of the United States appeared in open court before Honorable Frank H. Kerrigan, Judge, of the Superior Court within and for the City and County of San Francisco, State of California, accompanied by Gustav Holmgren and Frank Johnson, his witnesses, and thereupon the applicant and his witnesses were duly sworn and each examined in open court before the Judge thereof; and the testimony of the applicant and each of his witnesses, so far as applicable, was then and there re-

duced to writing in the form of affidavits, and has not been
85 entered of record in this proceeding. The Court finds that the said applicant was born in Finland. That he has resided in the United States continuously for more than five years last past and within the State of California during all of the year last past. That the applicant has (1) not heretofore made declaration under oath of his intention to become a citizen of the United States. The applicant was born on 3d day of May, 1879, and came to the United States in the year 1896, and has resided within the United States ever since, and in the State of California for more than one year last past. It has been bona fide his intention for more than two years to become a citizen of the United States, and he has declared that he will support the constitution of the United States and renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever, and particularly to the Czar of Russia, of which he has heretofore been a subject. (4) That the applicant, during the time of his residence in the United States, has behaved as a man of good moral character. That he is attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. That when the applicant was admitted to the United States, to wit, on or about the 12th day of May, 1896, he was not one of
any class of aliens excluded from admission into the United
86 States by the terms of "An Act to Regulate the Immigration of Aliens into the United States," approved March 3, 1903. He was not then an idiot, insane person or epileptic, nor a person who had been insane within the five years previous to his admission, nor was he a person who had had two or more attacks of insanity at any time. He was not then a pauper, a professional beggar, or a person likely to become a public charge. He was not then afflicted with a loathsome or dangerous contagious disease.

It also appears that the applicant, prior to his admission had not been convicted of a felony or other crime or misdemeanor involving moral turpitude. He was not then a polygamist, anarchist or a person who believed in or advocated the overthrow by force, or violence of the government of the United States, or of all government or of all forms of law. He did not then believe in or advocate the assassination of public officials. It also appears the applicant has not at any time procured or attempted to bring into the United States any prostitute or women for the purpose of prostitution.

The Court further finds that the applicant does not disbelieve in, and is not opposed to, all organized government. That he is not a member of, or affiliated with, any organization entertaining or
teaching disbelief in, or opposition to, all organization gov-
87 ernment. That he does not advocate or teach the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally of the government of the United States, or of any other organized government, because of his or their official character.

The said applicant, now in open court, declaring on oath that he absolutely and entirely renounce and abjure all allegiance and

fidelity to every foreign prince, potentate, state or sovereignty, whatsoever, and particularly to the Czar of Russia, of which he was before a subject or citizen, and having taken in the prescribed form, his oath that he will support the Constitution of the United States of America.

Now, therefore, it appearing that the applicant has in all things complied with and observed the laws regulating the naturalization of aliens, it is by the Court adjudged, order- and decreed that the said applicant be, and he is hereby, admitted and declared to be a citizen of the United States of America.

(Signed) FRANK H. KERRIGAN, *Judge.*

Office of the Clerk of the Superior Court.

CITY AND COUNTY OF SAN FRANCISCO,
State of California, ss:

I, John J. Greif, County Clerk and ex officio Clerk of the
88 Superior Court, in and for the City and County of San Francisco, State of California, said Court being a Court of Record, having common law jurisdiction and a clerk and seal, do certify that the within is a true copy of the Act of Naturalization of Frank Werta as the same appears on the Records of said Court, now in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 31st day of May in the year of our Lord one thousand nine hundred and five, and in the year of our Independence the one hundred and 29th.

[SEAL.] JOHN J. GREIF, *Clerk.*
By THOS. F. O'NEIL,
Deputy Clerk.

[Endorsed:] Superior Court, City and County of San Francisco, State of California. Act of Naturalization of Frank Werta.

Cross-examination.

Mr. WOODWORTH:

Q. Is this your handwriting—all of it?
A. Let me see that red ink. (After examination.) That is not.
Mr. MCKINLEY: We don't care anything about the red ink.
89 The WITNESS: The red ink is not mine.

Mr. WOODWORTH:

Q. How about the erasures, were they made by you?
A. Yes, sir.
Q. How did you come to make the copy?
A. Some one wanted to get a certified copy of the record.
Q. When did you make this copy?
A. On this date.
Q. On the 21st of May, 1905?

A. Yes, sir.
Q. For whom did you make this copy?
A. I cannot recall.

Mr. McKINLEY: We will show that.

Mr. WOODWORTH:

Q. You know nothing of what transpired in court on the 21st day of May, 1905?
A. No, sir; that was taken from the book.
Q. Is that a copy of the entire proceeding as it took place in court?
A. It is a certified copy of the record.
Q. And that is the entire record in the case?
A. Yes, sir; I believe it is.
Q. You are not sure about it?
A. I am pretty sure that is the act of naturalization.

90 Mr. McKINLEY: We have no further questions to ask, Mr. Werta.

(An adjournment is here taken until 2 P. M.)

Afternoon Session.

ALBERT HOUSTON, called for the United States, sworn.

Mr. McKINLEY:

Q. Where do you reside?
A. In Oakland at present.
Q. What is your business?
A. At present I am doing nothing.
Q. You were formerly a deputy county clerk of the office of the County Clerk of the City and County of San Francisco?
A. Yes, sir.
Q. During what period did you hold that office approximately?
A. From 1895 to 1906.
Q. During any of that period were you in charge of the naturalization department in the County Clerk's office?
A. Yes, sir.
Q. During what period approximately?
A. About the last four years.
Q. Do you know the record of naturalization and official document or official record of the County Clerk's office known as Book "A"?
A. Yes, sir.
Q. There was such a book when you were in the office?
A. Yes, sir.

91 Q. I show you now a form which appears to be pasted together on transparent paper entitled—I will state what it purports to be. It purports to be an affidavit of applicant—an affidavit of two witnesses in a naturalization matter. Disregarding the written portions of this document, and looking simply at the printed portions and the blanks, I will ask you to state whether or

not that is the identical form of affidavit of applicant and witnesses which appeared and was in used in Book "A" of official records about which I have been asking you.

Mr. WOODWORTH: Before the witness answers the question I should like to examine the paper.

Mr. MCKINLEY: I am not calling attention to the written portions or the red ink lines, and I call attention to both sides of the document.

Mr. WOODWORTH: I should like to ask the witness a few questions. I want to know if he pasted this together himself.

The COURT: He is not asked any such question as that. He is asked whether that is the form.

Mr. MCKINLEY:

Q. I want to know whether that is the form in use in Book "A," which has already been proven to be destroyed.

92 Mr. WOODWORTH: I object to the question as irrelevant, and it is not the best evidence to be obtained.

The COURT: Let me see it.

Mr. WOODWORTH: It is also incompetent irrelevant and immaterial.

The COURT (after examination): I do not see the materiality of it.

Mr. MCKINLEY: We expect to show that this defendant, Gustav Holmgren, signed and swore to an affidavit identical in form with the affidavit which is here. We expect to supplement this testimony of course by showing how those blanks were filled in. In other words, what was upon that record. We want to establish this as the record that appears in Book "A." It is in testimony that Book "A" has been destroyed. We expect to show that the record of naturalization of Frank Werta was in Book "A," and that this is the form of affidavit and judgments which appeared in that Book "A." We then propose to show exactly what that affidavit of Gustav Holmgren contained. We have shown the destruction of the record. It seems to me this is the only way to do it.

Mr. WOODWORTH: You cannot show it by an affidavit in some other case.

93 The COURT: I will sustain the objection to the introduction of this paper.

Mr. MCKINLEY: I have not offered it yet. I probably will wish to do so afterwards.

The COURT: It is not necessary to go any further with it because I do not see the particular relevancy of this paper as a paper. You will have no difficulty in proving by witnesses who know what must have been testified to there. Maybe some of them may remember. In any event the Judge who presided in that Court, I suppose, knows the general form in which it was done. I have no doubt whatever that a witness appearing in a naturalization proceeding in any court must have testified to facts showing that the applicant was entitled

to be admitted as a citizen before the Court would make the order of naturalization.

Mr. McKINLEY: I propose to show that that was the identical form.

The COURT: I do not think it makes any difference what the form. The question here is, was there such a naturalization proceeding as this that you set up in this indictment. In that proceeding was this defendant a witness, and did he testify in that proceeding to
94 the matters which you allege in the indictment, was his testimony false.

Mr. McKINLEY: I propose to show that his testimony was reduced to writing and was in this form.

The COURT: You can prove it by somebody who knows it.

Mr. McKINLEY: I can supplement this proof by testimony as to exactly what was in the affidavit of Mr. Holmgren. I expect to do that.

The COURT: Just put your witness on the stand.

Mr. McKINLEY: Does your Honor decline to allow the question as to this?

The COURT: My impression is that that particular is not material in this case.

Mr. McKINLEY: I will ask the question in this way——

The COURT: I do not propose to let that paper go in evidence and it is not necessary to ask any questions about it.

Mr. McKINLEY: Does your Honor decline to permit me to ask the witness this question: if he knows the form of affidavit contained in Book "A."

95 Mr. WOODWORTH: He has already testified to that.

The COURT: What difference does it make if he does or not?

Mr. McKINLEY: I propose to ask him to give it to us. I do not care whether this paper goes in so long as the record shows what was in that affidavit.

The COURT: I do not think that is the way to prove it. There are certain presumptions that are as strong as proof can be. There is a presumption that if a person appears as a witness, and upon his testimony the Court finds a certain fact, that is a strong presumption in the absence of any evidence to rebut it that the testimony of the witness justified the finding of the Court. When you get that you have got enough.

Mr. McKINLEY: The testimony is shown in this case by two witnesses. This is the only witness who is now on trial. I wish to show word for word just what he testified to.

The COURT: Put your witnesses on the stand who know the facts.

F. A. DURYEA, called for the United States, sworn.

96 Mr. McKINLEY:

Q. You are an attorney at law connected with the United States Attorney's office?

Mr. WOODWORTH: May I ask the object of this?

The COURT: It is not necessary for you to know what the object is. If any question is asked that is in your judgment not proper you can object to it.

Mr. MCKINLEY:

Q. Have you ever had occasion to examine Book "A," page 288, of the Acts of Naturalization of the Superior Court in the City and County of San Francisco, State of California, namely the record of one Frank Werta?

A. I have.

Q. Have you examined that affidavit thoroughly? I refer particularly to the affidavit of the defendant Gustav Holmgren, in this case?

A. I have.

Q. And you are familiar with the contents of that affidavit from such examination?

A. Yes, sir.

Q. Have you made or caused to be made a correct statement of the contents of the affidavit as it appeared in Book "A"?

A. Yes, sir.

Q. Is that it there (pointing)?

A. Yes, sir, I have a correct transcript of it here showing the affidavit as it appeared in Book "A," page 288.

97 Mr. MCKINLEY: I offer this form in evidence just as it is.

Mr. WOODWORTH: I object to it as incompetent and irrelevant and the proper foundation is not laid. It is a most remarkable proceeding.

The COURT: There is no question in the world but what a witness who has seen that record may testify to the contents of it. If he has any memory that will enable him to do it. If this witness has made a copy of it he may testify that it is a copy, and it goes to the jury for what it is worth. There is no doubt about that.

Mr. WOODWORTH: I will take an exception.

The COURT: Let me see what that paper is. (To the witness.) You say this is a copy of the affidavit as it appeared in the book?

A. I will explain to the Court how that was made. As the court knows I was in the former trial of this case, and had occasion to examine that affidavit particularly and to read it over several times. Of course, I cannot remember every word that was in that particular affidavit, but taking the form of the affidavit used in Book "A," the printed form, I filled in the evidence given by the witness Holmgren in that affidavit from my memory, which I remember

98 particularly and specifically. There is not any question about my memory in that respect.

Mr. WOODWORTH:

Q. When did you make this copy?

A. I had it made this morning. I had it struck off on the typewriter this morning.

Q. You did not copy it from the official record?

A. Not from the original record, no.

Q. But from other records?
A. The printed form of the affidavit, which I know to be the form that was used in Book "A."
Q. You filled in these dates from your own personal memory?
A. Yes, sir.

Mr. WOODWORTH: I object to that paper, if your Honor please.
The COURT: The objection is overruled; it will go in evidence.
Mr. WOODWORTH: I will take an exception.
(The paper is marked United States Exhibit 2 and is as follows:)

UNITED STATES EXHIBIT No. 2.

Affidavit of Witness.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

99 I, Gustav Holmgren, being first duly sworn, do depose and say I am a citizen of the United States, and my place of residence is 158 Perry St. I have resided in the State of California 14 years. I am well acquainted with 24½ Perry St., an applicant to be made a citizen of the United States, and have known him 7 years. I know the said applicant has resided within the United States continuously for the 7 years last past; that his place of residence has been at San Francisco. I know the said applicant has resided within the State of California during all of the year last past. (5) I know the applicant came to the United States about the year 1896, and that he has resided within the United States ever since. The applicant was a minor under the age of eighteen years when he came to the United States. I know him well and believe it has bona fide his intention, for more than two years, to become a citizen of the United States. (6) I further depose and say that during all my acquaintance with the applicant he has behaved as a man of good moral character, and I believe he is attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.

100 At the time I first became acquainted with the applicant he was not one of any class of aliens excluded from admission into the United States by the terms of "An Act to Regulate the Immigration of Aliens into the United States," approved March 3, 1903. That is to say, he was not then an idiot, insane person or epileptic, nor was he a person who had been insane within the five years previous to his admission, nor was he a person who had had two or more attacks of insanity at any time. The applicant was not then a pauper, a professional beggar or a person to become a public charge. He was not then a person afflicted with a loathsome or with a dangerous contagious disease. He was not then a polygamist, anarchist, or a person who believed in, or advocated the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law. He did not believe in or advocate the assassination of public officials.

I further depose and say, from my knowledge of the applicant and his history, that I fully believe his physical, mental or moral character and condition was the same at the time I first became acquainted with him as it was when he secured admission to the United States. I further depose and say that I firmly believe, and have no knowledge or information to the contrary, that the applicant, before his admission to the United States, had never been
101 convicted of a felony or other crime or misdemeanor involving moral turpitude. I firmly believe and have no knowledge or information to the contrary, that applicant has not, at any time, procured or attempted to bring into the United States any prostitute or woman for the purpose of prostitution, nor was he one deported as being under offer, solicitation, promises or agreements to perform labor or services contrary to the provisions of law.

I further depose and say that I know the behavior and sentiments of the applicant, and declare he is not one who disbelieves in, or is opposed to, all organized government. I know his associates and firmly believe he is not a member of, and is not affiliated with, any organization entertaining or teaching disbelief in or opposition to all organized government. The applicant does not advocate or teach the duty, necessity or propriety, of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally of the government of the United States, or of any other organized government because of his or their official character.

I fully believe and have no knowledge or information to the contrary, that the applicant will, if naturalized, make a worthy, peaceable and loyal citizen of the United States of America.

G. HOLMGREN.

102 Subscribed and sworn to before me this 21st day of Sept., 1903.

ALBERT B. MAHONY, *Clerk*,
By THOS. J. QUINN, *Deputy Clerk*.

THOMAS J. QUINN, called for the United States, sworn.

Mr. MCKINLEY:

Q. Where do you reside?
A. 3039 Twenty-second street.
Q. In the city and county of San Francisco?
A. Yes, sir.
Q. On the 21st day of September, 1903, what, if anything, was your official position?
A. Clerk of department three of the Superior Court.
Q. You were a deputy county clerk of the city and county of San Francisco, State of California, were you?
A. Yes, sir.
Q. And the courtroom clerk of department No. 3?
A. Yes, sir.
Q. Who was the Judge of that department at that time?

A. Judge Frank H. Kerrigan.
Q. The courtroom of that court was in the City Hall in this City?
A. Yes, sir.

Q. Now, Mr. Quinn, I will ask if you had occasion to ex-
103 amine the records of naturalization of one Frank Werta, contained in Book "A" of Acts of Naturalization, at page 288? Have you seen that record?

A. Yes, sir.
Q. State whether or not that record bore your signature as the deputy county clerk who swore the witness in that proceeding?
A. Yes, sir, it had my signature.
Q. Having seen your signature upon that record, would you say or will you say whether or not you swore the witnesses in that proceeding?
A. I have got no independent recollection of it. It is my usual custom.
Q. I do not expect a man to have an individual recollection about every individual case, but your signature appeared upon that record?
A. Yes, sir.
Q. And the seal of the Superior Court?
A. Yes, sir.
Q. In other words, that record purported to say did it not that the testimony therein contained was subscribed and sworn to before you as deputy county clerk in your official capacity?
A. Yes, sir.
Q. So that any witness who appeared in that proceeding, Gustave Holmgren, Frank Johnson, or any other person, was sworn by you?
A. It has been my custom.

104 Cross-examination.

Mr. WOODWORTH:

Q. You are simply testifying as to what your custom is. This occurred a long time ago. Are you able to testify to-day in this courtroom, before this jury, that on that particular date, you personally administered an oath to Mr. Holmgren?
A. No, sir, I could not say that.
Q. You cannot say that?
A. No, sir.

The COURT:

Q. If you certified that you did administer that oath you know that you did do it. or else that you made a false record, don't you?
A. I know if they signed it, they were sworn.
Q. That is the question put to you. The district attorney says, the record shows that you administered that oath and certified that you did. Assuming that to be so, are you able to say whether you did administer the oath? Have you any doubt about it?
A. No, sir, I have not any doubt about it.

Mr. WOODWORTH:

Q. But you are not able to say that you did administer the oath, at the present time, to Mr. Werta ?

A. I say that it was my custom.

Q. But you cannot swear to the jury that you personally administered an oath to this defendant on that particular day, can you?

105 A. No, sir, my best recollection is that I did, though.

Q. You cannot swear positively that you did?

The COURT:

Q. Can you state positively that you did not make a false record on that day? Are you positive of that?

A. I am positive of that, or any other day.

Mr. WOODWORTH:

Q. Where did you swear these people, in the courtroom?

A. In the courtroom.

Q. How many of these cases did you have a day sometimes?

Mr. MCKINLEY: I do not see that that is material. I——

Mr. WOODWORTH: It is for the purpose of testing the memory of the witness.

The COURT: I do not see that it is material.

Mr. WOODWORTH: I desire to show that there were a great many cases, and that the blanks were filled out and signed before.

The COURT: If you want to show by the witness that he was in the habit of making false records you can do it.

Mr. WOODWORTH: That is not the intention.

106 The COURT: I undertake to say that any public officer who signs a record and certifies to a fact before the act has taken place, that that is a false record. He cannot make up a record in anticipation of something that is to be done.

Mr. WOODWORTH: It is very frequently done in order to save time.

Q. How many cases did you have a day sometimes?

A. Seven or eight.

Q. Sometimes a great many more?

A. Yes, sir.

Q. Would you make out the blank as each one of these persons were admitted to become a citizen, or bunch all of them together?

Mr. MCKINLEY: I do not see that that is material.

The COURT: I think you have proceeded far enough, Mr. Woodworth.

Mr. WOODWORTH:

Q. How long were you deputy county clerk?

A. Half of 1902, all of 1903, and a portion of 1904.

Q. Has it ever happened that you made mistakes in entries, on dockets, or in the minutes?

Mr. McKINNEY: I object to that as immaterial.
107 The COURT: I sustain the objection.
Mr. WOODWORTH: I will take an exception.

Q. Has it ever happened that you signed these blanks when afterwards they were canceled by the Court, or for some reason not used?

Mr. McKINLEY: I object to the question as immaterial.
The COURT: I sustain the objection.
Mr. WOODWORTH: I will take an exception.

Q. Has it ever happened that you signed a number of these blanks before using them, when you had a number of these cases?

Mr. McKINLEY: I object to the question as immaterial.
The COURT: I sustain the objection.
Mr. WOODWORTH: I will take an exception.

Q. As I understand it, you cannot swear now that you ever administered this oath. You cannot recall as it is three years ago?
A. I cannot distinctly recall it, but my best recollection, I did.
Q. You simply say, you must have, because of the fact that your name is on that document?
A. Yes, sir.

108 JOHN JOKI, called for the United States, sworn.

Mr. McKINLEY:

Q. Where do you live?
A. 6 Howard.
Q. In San Francisco?
A. Yes, sir.
Q. Where were you born?
A. In Finland.
Q. When?
A. 1878.
Q. When did you come first to the United States?
A. 1901.
Q. On what ship?
A. The ship "Harbinger."
Q. The Russian ship "Harbinger" was it?
A. Yes, sir.
Q. About what time in 1901 was that?
A. I don't remember the month or the date either.
Q. Can you remember any particular thing that happened about that time so that you can fix it?
A. No, sir.
Q. Do you know Frank Werta who was on the witness-stand this morning?
A. Yes, sir, he was in the same ship.
Q. Frank Werta was on the same ship?
A. Yes, sir.
Q. In other words, he came with you to San Francisco on the Russian ship "Harbinger" in 1901, is that right?
A. Yes, sir.

Q. Where did you join that ship?
A. South Shields, England.
109 Q. Was Werta on that ship when you went on board?
A. Yes, sir, he was there before me.
Q. You went from South Shields, England, on the voyage of that ship to various ports and came to San Francisco?
A. Yes, sir.
Q. And Frank Werta came to San Francisco with you?
A. Yes, sir.
Q. How long were you on that ship with him altogether, about approximately?
A. Eighteen months.
Q. Did you leave that ship?
A. Yes, sir, I left the ship at San Francisco.
Q. Did Werta leave that ship at San Francisco, too?
A. Yes, sir.
Q. Where did you go when you left the ship, you and Mr. Werta?
A. To No. 6 Howard Street.
Q. Was Werta there at the same time?
A. He was there before me.
Q. Werta left the ship before you did?
A. Yes, sir.
Q. When you left the ship you saw him at No. 6 Howard Street?
A. Yes, sir, he was there before me.
Q. And you have known him ever since that time?
A. Yes, sir.

110 Cross-examination.

Mr. WOODWORTH:

Q. How long have you known Mr. Werta?
A. I know him about six or seven years.
Q. Do you know whether or not he came to the United States before he arrived at San Francisco with you?
A. I don't know.
Q. You do not know anything about his movements prior to his arriving in San Francisco?
A. No, sir, I never saw him before I shipped on that vessel.
Q. Do you know what American vessel he plied on?
A. No, sir, I don't know anything about that.
Q. You simply happened to be on a certain vessel with him, and arrived in San Francisco with him?
A. Yes, sir, that is all.
Q. You have had some conversation with Mr. Werta since this case?
A. No, sir, I meet him here.
Q. Were you not in jail and kept there by the Government?

Mr. MCKINLEY: I object to that. We detained the witness.
The COURT: Proceed, Mr. Woodworth.

111 Mr. WOODWORTH:

Q. Were you not kept in jail for a long time as a witness to testify in this case?

A. Yes, sir.

Q. Did the officers offer you any benefit to testify?

A. No, sir.

Q. Did Mr. Werta tell you in this city within the last two weeks that he had been promised his license back in case he testified in this case?

Mr. MCKINLEY: I object to that as improper cross-examination.

The COURT: The objection will be sustained.

Mr. WOODWORTH: Cannot I show——

The COURT: You need not carry that any further upon cross-examination.

Mr. WOODWORTH: I will make him my own witness for that purpose. Read that question to him, Mr. Reporter.

The COURT: You have not got to your case yet. You cannot cross-examine this witness any further upon that point.

Mr. WOODWORTH: I will have to recall him at the proper time. I thought I might ask him the question now.

112 F. O. JOHANSON, called for the United States, sworn.

Mr. MCKINLEY:

Q. You live at No. 6 Howard Street, in this city?

A. Yes, sir.

Q. And are the proprietor of that place, which is a hotel, is it not?

A. Yes, sir.

Q. How long have you been the proprietor of that house?

A. About sixteen years or so.

Q. Do you keep a register of the people who go to that hotel?

A. Yes, sir.

Q. Is that the book that you have there? (Pointing.)

A. Yes, sir.

Q. Is there an account in this book, or any record in this book, showing the presence in that house of John Joki?

A. Yes, sir.

Q. And of Frank Werta?

A. Yes, sir.

Q. Do you remember yourself when they were in there, or about?

A. Yes, sir, I remember that they were.

Q. About when was it?

A. In 1901.

Q. Will you show me the record of their presence there? Is that the John Joki record (pointing)?

A. Yes, sir.

Q. In whose handwriting is that?

A. John Christiansen.

Q. He was your bookkeeper at that time?

A. Yes, sir.

113 Mr. WOODWORTH: I object to the question and ask that the testimony of the witness be stricken out on the ground that it was not made by him.

The COURT: I overrule the objection.

Mr. WOODWORTH: I will take an exception.

Mr. MCKINLEY:

Q. The John Joki entry appears at page 492. Is page 493 the record as to Frank Werta?

A. Yes, sir.

Q. Read that.

The COURT: Where is the witness who made this record?

Mr. MCKINLEY: I will put him on next.

The COURT: Then you have got through with this witness.

Mr. MCKINLEY: I guess we have.

Mr. WOODWORTH: No questions. I will admit that these gentlemen made an entry that Mr. Joki and Mr. Warta arrived at that place at that time, to save time.

Mr. MCKINLEY: It is admitted that Frank Werta and John Joki, who have both testified here, went in the place of F. O. Johanson at 6 Howard Street, Frank Werta on the 9th day of March, 1901, and John Joki on the 12th of March, 1901.

114 Mr. WOODWORTH: Yes.

Mr. MCKINLEY: They both came to that place at that time.

Mr. WOODWORTH: Yes, that is admitted.

ALBERT KOLEHAMIER, called for the United States, sworn.

Mr. MCKINLEY:

Q. You are a seaman, are you?

A. Yes, sir.

Q. Do you know Frank Werta?

A. Yes, sir, Frank Wertenan.

Q. Sitting down at the end seat at that table (pointing) is that the man you know?

A. Frank Wertenan.

Q. Known in this country as Frank Werta?

A. I don't know.

Q. Is that the man (addressing the witness Werta). Stand up, Mr. Werta.

A. Yes, sir.

Q. You know him?

A. Yes, sir.

Q. I will ask you if you saw him on the Russian ship "Harbinger" at the port of San Francisco somewhere around the 22d of February, 1901?

A. Not exactly that day.

Q. Somewhere about that time?

A. Yes, sir.

Q. When did you see him?

A. About a week or two after.

115 Q. He was on the Russian ship "Harbinger" when you saw him?

A. Yes, sir.

Q. That was the time that the Russian ship "Harbinger" came to the port of San Francisco, that is right?

A. Yes, sir.

Q. Now, did you afterwards see him at the place of Mr. F. O. Johansen at No. 6 Howard Street?

A. Yes, sir.

Q. You lived there yourself did you not at that time?

A. Yes, sir.

Q. Do you know the defendant here, Gustave Holmgren, the man sitting over here (pointing)?

A. Yes, sir.

Q. I will ask you whether or not during the year 1901 you introduced Gustave Holmgren, the defendant, to Frank Werta, or to Franz Wertenan, as you call him?

A. Yes, sir.

Q. You introduced these two men and made them acquainted?

A. Yes, sir.

Q. Can you fix the date when that was?

A. No, sir, I cannot remember the date. It was after about three or four months.

Q. By that do you mean three or four months after Warta came to San Francisco on the Russian ship "Harbinger"?

A. Yes, sir.

116 Q. And at that time—three or four months after that time, you introduced this defendant to Frank Werta or Franz Wertenan, this man here in the courtroom?

A. Yes, sir.

Q. That was in the City and County of San Francisco, here in this city?

A. Yes, sir.

Q. What business was the defendant in at this time?

A. He was a delegate for the Sailors' Union.

Q. What else did he do?

A. Nothing else.

Q. Did he not have some business?

A. Not at that time.

Q. Did he not run a cigar business or saloon business?

A. No, sir.

Q. That was afterwards?

A. Afterwards.

Cross-examination.

Mr. WOODWORTH:

Q. Do you know whether or not the defendant knew Mr. Werta before you me- them? Will you swear that the defendant did not know Mr. Werta before you met them together?

Mr. McKINLEY: I think that calls for the opinion of the witness.

A. That I don't know.

Mr. WOODWORTH:

Q. You were not in Mobile in 1887?
A. No, sir.
Q. So you do not know whether the defendant met Mr. Werta then?

A. No, that I don't know.
117 Q. How long had you known the defendant?
A. Somewhere about eight or nine years.
Q. Here in the city?
A. Yes, sir.
Q. Do you know upon what vessels Werta had traveled?

Mr. McKINLEY: Objected to as not proper cross-examination.
The COURT: I sustain the objection.

Mr. WOODWORTH:

Q. How long have you been in jail here as a witness.

Mr. McKINLEY: I object to the question as immaterial, irrelevant and incompetent.

A. I have been arrested since the 16th of April.

Mr. WOODWORTH:

Q. Since the 16th of April you have been in jail waiting to be a witness in the case?
A. Yes sir.
Q. Kept there by the Government?
A. Yes, sir.

Redirect examination.

Mr. McKINLEY:

Q. And while kept there by the Government you have been paid the regular witness fees.

The COURT: That does not make any difference. You must rely upon the intelligence of the jury. The statute permits a
118 thing of that sort. Where a witness is unable to give bail for his appearance it permits him to be put in jail in order that he may give his testimony. It is no reflection on a witness or on the Government.
Mr. McKINLEY: That is what I want the jury to understand.
The COURT: You must assume that the jury has intelligence enough to understand that.

Mr. McKINLEY:

Q. In answer to Mr. Woodworth you said, and say it now, you knew Mr. Holmgren eight or nine years in San Francisco. That is right, is it?

A. Yes, sir.
Q. And he was here all the time so far as you know, during eight or nine years?
A. Yes, sir.

Further cross-examination.

Mr. WOODWORTH:

Q. Did you mean to say you saw him every day — a month in the city?
A. No, sir, I do not say that.
Q. Sometimes for six or seven months, or four or five months, you did not see him?
A. Not so long.
Q. What was the longest period?
A. About three or four months.

119 Mr. MCKINLEY: That is the case for the Government.
Mr. WOODWORTH: I ask for an instruction, if your Honor please, to acquit the defendant upon the ground that the corpus de licti has not been proven, and that the proofs are not sufficient to justify your Honor in sending the case to the jury.
The COURT: The motion is denied.
Mr. WOODWORTH: I will take an exception.

JOHN B. MARTIN, called for the defendant, sworn.

Mr. WOODWORTH:

Q. What official position, if any, do you occupy?
A. Police officer, with the rank of captain, in the San Francisco police department.
Q. How long have you held that position?
A. About four years.
Q. How long have you been connected with the police department?
A. Twenty-one years.
Q. Are you acquainted with Mr. Holmgren the defendant?
A. By sight.
Q. How long have you known him?
A. I only saw him a couple of times.
Q. You know of him, do you not?
A. Yes, sir.
120 Q. Do you know his character in the community in which he lives for honesty, integrity and veracity?

Mr. MCKINLEY: I object to the question. The proper foundation has not been laid, and the witness is not shown to be qualified to answer the question.
The COURT: I overrule the objection.

A. From a police standpoint, yes.

Mr. WOODWORTH:

Q. Is it good or bad?
A. Good.

Cross-examination.

Mr. MCKINLEY:

Q. In other words, he has never been arrested by you or any one to your knowledge, that is what you mean?
A. Not exactly that.
Q. All you know about him is what you have heard people say, and that from a police standpoint his character, is good?
A. From my investigations.

JAMES MCGOWAN, called for the defendant, sworn.

Mr. WOODWORTH:

Q. What official position do you occupy?
A. I am a police officer detailed on detective duty on the water front.
121 Q. How long have you been connected with the department?
A. Between twelve and thirteen years.
Q. And down at the waterfront?
A. Ten years.
Q. Are you acquainted with the defendant here?
A. Very well.
Q. How long have you known him?
A. About eight years.
Q. From your personal acquaintance with him, and your knowledge derived from other sources, can you state what this character is in this community for truth, honesty and integrity?
A. Excellent.

Cross-examination.

Mr. MCKINLEY:

Q. What is his business?
A. When I first knew him he was a walking delegate for the Sailors' Union.
Q. What is his business now, and what has it been recently, within the last year or two?
A. He was in the saloon business on Howard Street.
Q. You knew him as a waterfront saloon-keeper and a delegate for the Sailors' Union?
A. Yes, sir, and a very useful man to the police department.
122 Q. From the fact that he was useful to the police department you conclude that his reputation is good. In other words, he stands well with the police because he has been useful to them?
A. I have heard his reputation discussed quite frequently.

Q. He has been useful in the matter of giving information to the police department when they desired it?
A. Very useful information on two or three occasions.

Redirect examination.

Mr. WOODWORTH:

Q. In maintaining the laws and helping you gentlemen out.

The COURT: I think the sooner you get through with the witness the better. You are taking up time unnecessarily. Nothing is ever gained in cross-examining a witness who testified as to character.

JAMES MCGRATH, called for the defendant, sworn.

Mr. WOODWORTH:

Q. How long have you been connected with the police department?
A. Twenty-one years.
Q. How long have you known the defendant?
A. Five or six years.
123 Q. Do you know him personally?
A. Yes, sir.
Q. From what you know of him personally and derived from other sources, do you know what his character is in the community in which he lives for truth, honesty and integrity?
A. Always goods.

Mr. MCKINLEY: No questions.

A. FERUSETH, called for the defendant, sworn.

Mr. WOODWORTH:

Q. Where do you reside?
A. I don't remember the number; it is on the corner of Main and Bryant.
Q. What is your business. What position do you occupy?
A. Secretary of the Sailors' Union.
Q. As such have you had occasion to become acquainted with the defendant?
A. Yes, sir.
Q. How long have you known him?
A. I have known him personally since sometime in 1898; I don't remember what time in 1898 I first learned to know him personally.
Q. Have you seen a great deal of him since then?
A. I saw some of him for the next year and a half, and then from 1900 until 1902, he was patrolman.
Q. Under you?
A. Yes, sir.
124 Q. Now, do you know his character, from what you know of him personally and observed of him as a patrolman. Do you know his character in the community for truth, integrity, and veracity?

A. His reputation on the front has been that of a man who is truthful and honest.

Mr. McKinley: No questions.

Adolph Backman, called for the defendant, sworn.

Mr. Woodworth:

Q. Where do you live?
A. At No. 6 Howard Street.
Q. What is your business?
A. I am a seaman.
Q. How long have you been such?
A. For the last twelve years.
Q. Do you know Frank Werta?
A. Yes, sir, I know him.
Q. The gentleman in this courtroom?
A. Yes, sir.
Q. Have you been on vessels with him?
A. No, sir, I have not.
Q. How long have you known him?
A. A little over four years.
Q. Where?
A. He was stopping in the same house with me at 6 Howard Street.
125 Q. Here in the City and County of San Francisco?
A. Yes, sir.
Q. Have you seen a good deal of him since you first met him?
A. Yes, sir.
Q. Do you know his reputation for truth and veracity in this community?
A. Yes, sir, I do.
Q. Is it good or bad?
A. As far as I know it is bad.
Q. Would you believe him un[illegible]th?
A. No, sir, I would not.

Cross-examination.

Mr. McKinley:

Q. Have you ever had any trouble with Frank Werta?
A. No, sir.
Q. You do not like him very well?
A. The same as any other man.
Q. Do you mean to say that he is a particular friend of yours; that you like him very much?
A. No, sir, he is not.
Q. What trouble did you ever have with him? Tell us about it.
A. I did not have any trouble exactly.
Q. You did not have any trouble at all?
A. Not exactly.

126 Q. Who asked you to come here and testify against Frank Werta's reputation?

A. I met Gus Holmgren a couple of days ago and he asked me what I knew about Frank Werta, and I told him the same as I have been telling you.

Q. You told him Frank Werta was no good, and he asked you to come up and testify is that right?

A. Yes, sir.

Q. Who else asked you to come up here?

A. No one else.

Q. You say that you never had any trouble yourself with Werta?

A. No, sir.

Q. Did Werta have any trouble with friends of yours?

A. Yes, sir, lots of my shipmates have had trouble with him.

Q. So he had trouble with persons who are friendly to you and you do not like him?

Mr. WOODWORTH: That is not what he testified to, that is not fair.

The COURT: I hope, Mr. Woodworth, you will let Mr. McKinley conduct this examination. You have been about courts long enough to know that that is the orderly way of doing things.

Mr. WOODWORTH: I desire to enter in the record that I object to the conduct of the District Attorney in interrogating this witness.

127 E. FALK, called for the defendants, sworn.

Mr. WOODWORTH:

Q. What is your business?

A. Seafaring man.

Q. How long have you followed the sea?

A. Fifteen years.

Q. Do you know Frank Werta? Have you ever been on vessels with him?

A. Yes, sir.

Q. What particular vessel? Can you recall now?

A. On the "Phœnix."

Q. How long have you known him on the "Phœnix" and other vessels in the city here?

A. Four or five years.

Q. Do you know his reputation in the city here, in the community in which he resides for truth and honesty?

A. Yes, sir.

Q. What is it, good or bad?

A. Bad.

Q. Would you believe him on the stand under oath?

A. No, sir, I would not.

Cross-examination.

Mr. MCKINLEY:

Q. You do not like Mr. Werta very well, do you?

A. Yes, sir.

Q. You like him, you say. Is he a good friend of yours?
A. No, sir, not a particular friend.
Q. You do not like him?
128 A. Yes, I have nothing against him.
Q. Ever had any trouble with him?
A. No, sir.
Q. Did any of your friends have trouble with him?
A. Nothing that I know of.
Q. How do you know his reputation is bad?
A. Because I have been together with him.
Q. Then he must have done something. What did he ever do to you?
A. Nothing to me.
Q. Did he ever do anything to anybody else, to any friend of yours?
—. No, sir.
Q. Who did you hear say that his reputation was bad, that he was no good?
A. I know that from lots of people.
Q. Who asked you to come up here and give your testimony, and swear that this man's reputation was bad?
A. Mr. Woodworth.
Q. Did you see Mr. Holmgren, the defendant?
A. I see him, yes.
Q. Did he ask you to come up here?
A. No, sir.

Mr. WOODWORTH: I shall have to ask for a postponement, if your Honor please, until to-morrow morning. I will be ready to-morrow morning at 10 o'clock. I regret very much to ask the indulgence
of the Court, but it is really my mistake. I should have
129 had all my witnesses here. Under the circumstances and to protect the rights of the defendant, I shall have to ask a postponement.

The COURT: If you had subpœnaed them I would have had an attachment issued. If you say it is your fault I cannot issue it.

Mr. WOODWORTH: I will take the blame. I did not think the District Attorney would get through with the case this afternoon.

The COURT: Send out and get your witnesses. Otherwise you will have to close the case.

Mr. WOODWORTH: It is a great hardship to make the defendant suffer for my innocent error. I will consume but a very short time in the morning if your Honor will let this case go over.

The COURT: Call your witnesses.

Mr. WOODWORTH: They are not here.

The COURT: Then close the case.

Mr. WOODWORTH: I decline to. I shall have to take an exception. I ask your Honor to grant me a continuance until to-morrow morning. The testimony I desire to present is of the utmost importance to the liberty of the defendant.

The COURT: What is it.

130 Mr. WOODWORTH: It is evidence of the same character that I have already put in, and other evidence showing the good

character of this defendant. Judge Lawson, the Justice of the Peace will be here; he is engaged in doing Coroner's duty.

The COURT: Do you propose to introduce any evidence in regard to the character of the defendant, Mr. McKinley?

Mr. MCKINLEY: We have no evidence on hand.

The COURT: If you do not then we will let the case stand.

Mr. MCKINLEY: Not as at present advised.

Mr. WOODWORTH: The other witnesses will be in the same direction.

The COURT: Give their names. Probably the District Attorney will admit if they were here they would so testify.

Mr. WOODWORTH: Very well. One is Charles Harrison, Donald Bruce, Gus Magnusson, L. T. Green, Harry Olsen, Peter Johnson, Albert Fir. All will testify to the same effect.

Mr. MCKINLEY: I do not care to make any admissions. I have answered that we have no testimony on the character branch of the case. That is as much as I can say.

131 The COURT: That being so, you can close the case, Mr. Woodworth.

Mr. WOODWORTH: I except to the ruling of the Court compelling me to close the case at this time.

The COURT: I do not compel you to close the case. If the District Attorney does not propose to controvert the evidence you have introduced, it is not necessary to take up time with those witnesses.

Mr. WOODWORTH: Do you admit, Mr. McKinley, that those witnesses will testify to the same effect?

Mr. MCKINLEY: I have no witnesses upon that branch of the case. That is the only proposition.

Mr. WOODWORTH: If the District Attorney will not admit that, we are entitled to go before the jury, if your Honor please, and show that the chief witness is a man who cannot be believed. That is a material right of the defendant. If your Honor will only adjourn the case until to-morrow morning we can get the people here. I understand that one of my witnesses has just come in.

The COURT: Put him on the stand.

132 L. T. GREEN, called for the defendant, sworn.

Mr. WOODWORTH:

Q. Where do you live?
A. 230 East Street.
Q. How long have you lived here?
A. For six years.
Q. Do you know Mr. Frank Werta?
A. I do.
Q. How long have you known him?
A. For four years.
Q. And where?
A. Around East Street; we were together on board of the steamer "Phœnix."
Q. You have also known him around the waterfront?
A. Yes, sir.

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Q. Do you know his character in this community for truth, honesty and integrity?
A. I do not know anything good of him.
Q. Is it good or bad?
A. As far as I know it is bad.
Q. Would you believe him under oath on the stand?
A. I would not.

Cross-examination.

Mr. McKINLEY:

Q. What is your business?
A. Seaman.
Q. You do not like Mr. Werta very well?
A. I do not.
Q. Ever had trouble with him?

133 The COURT: That does not make any difference. He says he does not like him.
Mr. McKINLEY: That is all.
Mr. WOODWORTH: I have no more witnesses here, if your Honor please. I will have the rest here to-morrow morning, and I will promise not to take more than five minutes.
The COURT: With your witnesses?
Mr. WOODWORTH: Yes.
The COURT: That being so, we will take an adjournment until 10 o'clock to-morrow morning.
Mr. McKINLEY: I do not want to be placed in a false position, if your Honor please. If the case is to be postponed, I may possibly procure witnesses upon this branch of the case. I do not know.
The COURT: If the case goes over, Mr. Woodworth will have every witness here he can think of and you can put on all you have.
Mr. McKINLEY: I wanted simply to set myself right with the Court.
The COURT: I understand now that Mr. Woodworth expects to close his testimony in five minutes.
Mr. WOODWORTH: Indeed, I will. If they are not here I will proceed without them.

134 (An adjournment was here taken until to-morrow morning at 10 o'clock, after the usual statutory admonition had been given to the jury.)

JULY 13TH, 1906.

GUSTAVE MAGNUSSON, called for the defendant, sworn.

Mr. WOODWORTH:

Q. Where do you live, Mr. Magnusson?
A. 315 Austin Avenue.
Q. What is your business?
A. Sailor.
Q. Have you any other business aside from that at present?

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A. Yes, sir, I am a janitor.
Q. Where?
A. In the school department.
Q. Do you know Frank Werta?
A. Yes, sir, I do.
Q. How long have you known him?
A. Between four and five years.
Q. Where have you known him?
A. Going to sea; being a shipmate with him.
Q. Have you also known him here in San Francisco?
A. Yes, sir.
Q. Do you know his character for truth and honesty in this community?
A. Yes, sir.
Q. Is it good or bad?
A. Bad, I found out.
135 Q. Would you believe him under oath?
A. No, sir.

Mr. McKINLEY: No questions.

ANDREW SWANSON, called for the defendant, sworn.

Mr. WOODWORTH:

Q. Where do you live?
A. 225 Stuart Street.
Q. What is your business?
A. Sailor.
Q. Do you know Frank Werta?
A. Yes, sir.
Q. How long have you known him?
A. About three years.
Q. Where have you known him?
A. On the coast and in San Francisco.
Q. Do you know his character in this community for truth honesty and integrity?
A. Yes, sir.
Q. What is it, good or bad?
A. Bad.
Q. Would you believe him on the stand under oath?
A. I do not think so.

Cross-examination.

Mr. McKINLEY:

Q. Who asked you to come here and testify?
A. Mr. Woodworth. I spoke to him yesterday.
Q. Who spoke to you before that?
A. Nobody.
136 Q. Do you mean to say nobody referred you to Mr. Woodworth. Did not the defendant here ask you to come up here and testify?

A. No, sir. I have been acquainted with Mr. Holmgren for some time though.
Q. He is a good friend of yours is he not?
A. Nothing particular. I have known him off and on.
Q. But Mr. Werta is a bad friend of yours, is that right?
A. No, sir.
Q. Ever had any trouble with him?
A. No, sir.
Q. Any of your friends have any trouble with him?
A. Not as far as I know.
Q. How came you to say that his reputation is bad if you never had any trouble with him, simply because you do not like him?
A. No, that is not the thing.

Mr. McKinley: That is all.

Harry Olsen, called for the defendant, sworn.

Mr. Woodworth:

Q. What is your occupation?
A. Seaman.
Q. And how long have you been such?
A. For the last fifteen years, off and on.
Q. Where do you live, in the city?
137 A. I was burned out. I have no place to live now. I am rooming anywhere.
Q. Do you know Frank Werta?
A. Yes, sir.
Q. How long have you known him?
A. Five years, something like that.
Q. Where have you known him?
A. We were together on a boat, called the "Westport."
Q. Have you known him here also in San Francisco?
A. Yes, sir, and I have been together with him after that.
Q. Do you know his character in this community for truth honesty and integrity?
A. I know his character.
Q. What is it, good or bad?
A. Bad according to my estimation.
Q. Would you believe him if he were on the stand, under oath?
A. I would not.

Cross-examination.

Mr. McKinley:

Q. What trouble have you had with Mr. Werta?
A. I never had any special trouble with him.

138 PHILLIP MENDO, called for the defendant sworn.

Mr. WOODWORTH:

Q. What is your business?
A. I am a sailor.
Q. Have you any other business at the present time?
A. I am driving an express wagon at present.
Q. Do you know Frank Werta?
A. Yes, sir.
Q. How long have you known him?
A. About two years.
Q. Do you know his reputation in this community for truth and honesty?
A. Yes, sir, I never had any dealings with him ashore. I have been a shipmate with him. I heard lots of talk about him.
Q. What was that talk about him. Good or bad?
A. I would rather say it was bad.

Mr. MCKINLEY: No questions.

JOHN LINGREN, called for the defendant, sworn.

Mr. WOODWORTH:

Q. Do you know Frank Werta?
A. Yes, sir.
Q. How long have you known him?
A. About two and a half or three years.
139 Q. Do you know his reputation in this community for truth and honesty?
A. Yes, sir.
Q. Is it good or bad?
A. What I heard from his friends, it is bad.

Cross-examination.

Mr. MCKINLEY:

Q. What is your business?
A. In the saloon business.
Q. Where?
A. No. 7 Howard Street.
Q. Somewhere near the saloon kept by the defendant?
A. Yes, sir, not very far from it.
Q. You are a good friend of Mr. Holmgren's?
A. Not particularly.
Q. But you are his friend just the same?
A. We have been neighbors for a couple of years.
Q. Who asked you to come up here and testify?
A. Mr. Woodworth.
Q. Who else besides Mr. Woodworth spoke to you about it?
A. I don't know. I suppose Mr. Holmgren told Mr. Woodworth that I knew Frank Werta.
Q. Did not Mr. Holmgren speak to you about it?

A. No, sir.
Q. Never had any trouble with Mr. Werta?
A. No, sir.
Q. You do not like him?
A. I like him first class.
140 Q. Yet you are willing to come up here and knock him?
A. I heard from his friends that he was not of much account aboard of a ship.
Q. Are you sure that what you heard was from his friends?
A. Yes, sir, that is what I heard.
Q. Don't you mean from his enemies?
A. No, sir.

Mr. WOODWORTH: I have one witness here as to the character of the defendant.
The COURT: Put him on.

HENRY HEING, called for the defendant, sworn.

Mr. WOODWORTH:

Q. Where do you reside?
A. At 2626 Hyde Street.
Q. How long have you lived in the city?
A. About thirty-three years.
Q. Are you acquainted with Mr. Holmgren, the defendant?
A. Yes, sir.
Q. How long have you known him?
A. For probably six to seven years.
Q. Do you know his character in this community for truth, and honesty?
A. As far as I have known.
Q. Is it good or bad?
A. Good. I have always found it good.

141 Cross-examination.

Mr. MCKINLEY:

Q. The six or seven years you have known him have been in San Francisco?
A. Yes, sir.
Q. What is your business?
A. Salesman.
Q. In what line?
A. Cigars and tobacco.
Q. Mr. Holmgren is a customer of yours, I presume?
A. Yes, sir.
Q. The extent of your knowledge of him I suppose is that he pays his bills and never gives you any trouble about collecting them?
A. No, sir, he has been one of the best pay I have had. I have known him from meeting him that way and always found him truthful and honest in all my dealings with him.

Q. He meets his obligations.

The COURT: Call your next witness.

Mr. WOODWORTH: Judge Lawson will be here in a few minutes, if your Honor please.

The COURT: I cannot wait for him.

Mr. WOODWORTH: Then I will close the case.

THOMAS R. CURTIS, called for the United States in rebuttal, sworn.

Mr. MCKINLEY:

Q. You reside in San Francisco?

A. Yes, sir.

142 Q. What is your business?

A. Bookkeeper.

Q. Connected with what concern?

A. I am bookkeeper and Secretary of the Dunphy Estate.

Q. Do you know Frank Werta?

A. Yes, sir.

Q. How long have you known him?

A. Two years or a little over.

Q. He has been a tenant of yours during that time?

A. Yes, sir.

Q. Do you know his general reputation in this community in which he lives for truth, honesty and integrity during that time?

A. His reputation is good.

Cross-examination.

Mr. WOODWORTH:

Q. As I understand he is simply just a tenant of yours?

A. Yes, sir.

Q. You have not been to sea with him?

A. No, sir.

Q. Your acquaintance is simply that of a tenant. You do not associate with him, do you?

A. I have met him every day. He lived next door to me. I never heard anything against him, but, on the contrary, that he was a good, sober, honest man and always tried to do what was right.

143 Mrs. ABBIE L. BONDE, called for the United States in rebuttal, sworn.

Mr. MCKINLEY:

Q. Where do you reside, Mrs. Bonde?

A. I live at 2678 Folsom Street.

Q. In this city?

A. Yes, sir.

Q. Do you know Frank Werta?

A. Yes, sir.

Q. How long have you known him?

A. Over two years.
Q. Do you know his general reputation in this community for truth, honesty and integrity
A. Yes, sir, he is very honest and is willing to do what is right by his family. He is a very quiet sober industrious man.
Q. In other words, you would say that his reputation is good?
A. Yes, sir.

Mr. WOODWORTH: No questions.

JACOB ISO, called for the United States in rebuttal, sworn.

Mr. MCKINLEY:

Q. What is your business?
A. I am a carpenter.
Q. Where do you live?
A. 1016 De Harrow Street, San Francisco.
Q. Do you know Mr. Frank Werta?
A. Yes, sir, I know him for over two years, maybe three
144 years.
Q. Do you know his general reputation in this community for truth, honesty and integrity?
A. So far as I found him out he was all right.

Mr. WOODWORTH: No questions.

EMILE CARLSON, called for the United States in rebuttal, sworn.

Mr. MCKINLEY:

Q. What is your business?
A. I am working for the Gas and Electric Company.
Q. You are a foreman of laborers there are you not?
A. Yes, sir.
Q. How long have you resided in San Francisco?
A. About nine years.
Q. Do you know Frank Werta?
A. Yes, sir, I know him.
Q. How long have you known him?
A. Ever since he came here.
Q. Sometime in 1901 in 1901, is that right?
A. Yes, sir.
Q. Is he working under your supervision now?
A. Yes, sir.
Q. He is employed by the same company and is under your charge?
A. Exactly.
Q. You have known him ever since he came here?
A. Yes sir.
145 Q. Do you know his general reputation in the community for truth, honesty and integrity?
A. Yes, sir.
Q. What is it?
A. It is good.

Mr. WOODWORTH: No questions.

A. B. LAWSON, called for the defendant, sworn.

Mr. WOODWORTH:

Q. Where do you reside?
A. In the City and County.
Q. What official position do you occupy?
A. Judge of the Justices' Court and Acting Coroner of the City and County.
Q. Are you acquainted with the defendant here?
A. Yes, sir.
Q. How long have you known him?
A. Six or seven years.
Q. Approximately how long?
A. Over five.
Q. Here in the city?
A. Yes, sir.
Q. Do you know his reputation for honesty and integrity?
A. Yes, sir.
Q. Is it good or bad?
A. It is good.

Mr. MCKINLEY: No questions. That is the case.
Testimony closed.

The foregoing constitutes all the evidence and all of the testimony in the case. Thereupon, Mr. McKinley, one of the
146 counsel for the United States, proceeded to address the jury and to make his argument in support of the prosecution, and was followed by Mr. Woodworth in behalf of the defendant, and Mr. McKinley made the closing argument in behalf of the prosecution. That at the conclusion of the arguments of the respective counsel the Court delivered its charge to the jury as follows:

Charge to the Jury.

The COURT (orally):

Gentlemen of the Jury: My charge will be very brief.

The defendant is charged in the indictment with having sworn falsely in a naturalization proceeding, on the application of Frank Werta for naturalization on September 21st, 1903.

It is charged that the defendant having been duly sworn and taken oath before the Court in that proceeding, testified falsely as to certain material matters involved in the case, that is, it is alleged that he swore at the time that the applicant had arrived in this country to reside while under the age of eighteen years, and had resided in the United States for the last three years of his minority, and had continued to reside in this country until the time of his making said application to be naturalized, and had resided in this country for five years immediately prior to the making of such application. It is further charged that the said Frank Werta did not

arrive in this country to reside while under the age of
147 eighteen years; that he had resided in this country for the last three years of his minority, and had not resided in this country for the last five years immediately prior to the making of said application, and that the defendant at the time he testified that he had so resided in this country knew he was testifying falsely.

The defendant is presumed to be innocent, and he is entitled to the benefit of this presumption as evidence in his favor; and you will not be justified in returning a verdict of guilty unless you are satisfied beyond a reasonable doubt, after a consideration of all the evidence, that he is guilty.

You are instructed that the Superior Court of the City and County of San Francisco, State of California, had jurisdiction to naturalize aliens as citizens of the United States of America.

You are further instructed that an alien arriving in this country under the age of eighteen years, and residing here until he has reached the age of twenty-one years, having resided here continuously for five years in all, may be admitted to be a citizen of this country by a Superior Court of the State of California without having made a previous declaration of intention under oath, upon proof to the satisfaction of the Court that he did so arrive in this country while under the age of eighteen years, and had con-
148 tinued thence forward to reside in the United States until arriving at the age of twenty-one years, and until he makes application to be naturalized, and had so continuously resided in the United States for five years immediately prior to his application for naturalization.

You are further instructed that a clerk of a Superior Court of the State of California has competent authority to administer an oath to a witness in a naturalization proceeding and that the laws of the United States authorize such oath to be administered.

If you find from the evidence beyond a reasonable doubt that the defendant here was duly sworn in the proceeding referred to, and took oath to testify as a witness in that proceeding as charged in the indictment, and he, after having been so sworn and having taken such oath, willfully and knowingly testified falsely that the said Frank Werta had resided in the United States continuously for a period of five years immediately prior to the time of the said hearing of the application, and had resided in the United States continuously during the three years next preceding his arrival at the age of twenty-one years, and had continued from his said arriving at said age until the time of said hearing to so reside in the United States, and that he, the said defendant, had been acquainted with him, and had known the said Werta during the said
149 five years immediately preceding such hearing, it will be your duty to bring in a verdict of guilty, that is, if you find that the testimony was knowingly false.

You are the exclusive judges of the credibility of the different witnesses. In judging of the testimony of the witnesses you have the right to consider the manner in which they testified, that is, their appearance while giving testimony, their opportunities to know and

their knowledge of what they testified about, their intelligence or want of intelligence, the probability or improbability of their statements, and their interest or lack of interest in the result of the trial.

If a witness willfully swears falsely to any material fact in the case you are at liberty to disregard the whole or any portion of his testimony, and the fact that the witness has made contradictory statements may be considered by you in determining what weight you are to attach to his testimony.

Witnesses have testified in your hearing that the reputation of the witness, Frank Werta, for truth, honesty and integrity is not good. In this connection I charge you that the bad reputation of a witness for *for* truth, honesty and integrity, if proved, is a fact to be considered by the jury in determining the credibility of such witness, that is, in determining what weight they will give
150 to the testimony of such witness. The question of the credibility of any witness is one for the exclusive determination of the jury, and if you believe that the witness Frank Werta testified to what was true it will be your duty to act upon that testimony notwithstanding you may believe that his reputation for truth, honesty and integrity is not good.

You are further charged that you cannot convict the defendant upon his statements, admissions or actions alone, independently of his statements or actions, there must be other evidence tending to show that the crime had been committed.

A reasonable doubt of the guilt of a defendant is a doubt based upon reason, and which is reasonable in view of all the evidence,—an honest, substantial misgiving, generated by insufficiency of proof,—and not a captious doubt, or a doubt suggested by the ingenuity of counsel or anyone else, and unwarranted by the testimony; nor is it a doubt borne of a merciful inclination to permit the defendant to escape conviction or prompted by sympathy with him, or those connected with him.

There has been evidence introduced to show that the character of the defendant for honesty, truth and integrity is good. It is your duty to consider that evidence, and if it has been established to your satisfaction that the defendant has borne that kind of
151 character it is a fact that you must consider throughout your deliberations. You not only have the right, but it will be your duty to consider it throughout your deliberations, giving it such weight as you think it is entitled to under the circumstances of the case; but if you are satisfied beyond a reasonable doubt of the guilt of the defendant notwithstanding his good character, then it will be your duty to bring in a verdict of guilty.

You are instructed that it is incumbent upon the Government to prove the guilt of the defendant beyond a reasonable doubt, by the testimony of two witnesses or by the testimony of one witness and corroborating circumstances with reference to each assignment of perjury contained in the indictment, that is before you can find him guilty upon such assignment.

You are instructed that the record and judgment in a naturaliza-

tion proceeding in which the alleged false testimony was given, are admissible only as a matter of inducement to the perjury to show the pendency of the proceeding, the jurisdiction of the Court, and the giving of the testimony, and its materiality to the issue, but not for the purpose of establishing the truth or falsity of the testimony.

You are further instructed, gentlemen, that as the original records have been destroyed the law permits secondary evidence of
152 their contents, and it is for you to determine whether evidence of the contents of that lost record has been proven to your satisfaction. In addition to the final judgment of naturalization, or a certified copy of it, you have before you the testimony of the witness Duryea who testified in substance that he was familiar with the original record, that he knew its contents, and that he was able to say that the exhibit which has been introduced in evidence here would be a true copy of the testimony of the witness Holmgren, given in that proceeding.

Of course, gentlemen, it is for you to determine the credibility of that witness. You will further determine whether he may or may not be mistaken in regard to what he testified to. If you believe, however, that he is a credible witness, and that he was not mistaken in the matters that he testified to, why then you will have to accept that as evidence of the contents of the record in that respect. You must be satisfied of that fact beyond all reasonable doubt.

The defendant has not been sworn as a witness in this case, and in relation to that I read you the following as the law that is to govern you in considering that fact:

"That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the United States Courts, the person so charged shall, at his own request, but not
153 otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him."

With these instructions you may retire and deliberate upon your verdict.

Mr. WOODWORTH: I desire, if your Honor please, to take exception to the action of the Court in refusing to give the instructions requested by us, and if satisfactory, without reading them, I will give the numbers to the reporter. I handed them to your Honor. Instructions No. 1 to No. 23 inclusive, and additional instructions No. 1 to No. 6 inclusive.

The COURT: If there is any particular matter in those instructions that you would like to direct the attention of the Court to that you reply upon I would like to have you point it out. I sometimes inadvertently may omit to give something. There are a large number of instructions covering a great many pages.

Mr. WOODWORTH: Instruction No. 4 that there must be a criminal intent and that that must be established by the Government beyond a reasonable doubt. I do not remember that your Honor instructed about that.

The COURT: The jury were instructed in this case that they must

be satisfied beyond all reasonable doubt not only that the
154 testimony alleged to be given was false, but that it was willfully and knowingly false, that he willfully and knowingly testified falsely. That covers that.

Mr. WOODWORTH: No. 5, that you cannot convict a defendant on a mere surmise suspicion and conjecture, and instructions No. 8 and No. 9 to the effect that the testimony must not only be false but that the party making it must believe it to be false; and also instruction No. 14 that perjury cannot be imputed upon the full knowledge of the falsity of the testimony, and cannot be predicated where willfulness, corruption and malice are not manifest. I do not think your Honor charged to that effect. The additional Instruction No. 2, with reference to the fact that where a person who is a mariner comes to the United States and afterwards follows his business, as a mariner, if he has the intention of becoming a citizen of the United States, that his abode on American vessels would constitute a residence in the United States; additional instruction No. 3, furthermore that if the jury believe the testimony of Werta then he is an accomplice, and must be supported under the law by the testimony of one person or very strong corroborative circumstances; furthermore, additional instruction No. 5, that where the original
records have been lost and destroyed the jury should view the
155 testimony of secondary evidence as to their contents with very great care in view of the fact of frailty of memory.

The COURT: That instruction, I think, I gave substantially. If I did not, as a matter of course, the jury understand the liability of all parole evidence to mistake. If they are satisfied that the witness Duryea was not mistaken, that he meant to tell the truth, and was able to tell it, then they must act upon it.

Mr. WOODWORTH: Precisely. I want also, if your Honor please, a general exception to the charge of your Honor as given, and an exception to the instructions given by your Honor, and requested by us as modified by your Honor, and also the refusal of the Court to give the instructions requested.

Thereupon and before the jury retired to deliberate upon their verdict the clerk of the Court handed to the jury the forms of ballot with the indictment in the case. That said indictment was taken by them to the jury-room and retained by them during their entire deliberations in the cause. That the jury retired at 12.30 o'clock and later returned to the Court with a verdict of guilty on the third count of said indictment. That at the time said indictment was
handed to the jury by the officials of the court and was taken
156 by said jury to the jury-room, there were the following endorsements upon said indictment:

"Form No. 168. Back of cover of indictment with plea and judgment. Arraigned Nov. 2, 1905. Mch. 14, 1906. Pleads not guilty. Tried April 5-6-7, 1906. Verdict not guilty on the 1st and 2d Counts of the Indictment and Guilty on the 3d count of the Indictment. April 13, 1906. New Trial granted."

That at the proper time and before the argument to the jury,

the defendant in writing submitted and requested of the Court that the following instructions be given to the jury, viz:

I.

"I charge you that every person accused of crime is presumed to be innocent until his guilt is established beyond reasonable doubt. The law presumes him to be innocent, and this presumption goes with him all through the trial, and into the jury-room and when you retire to consider your verdict, and remains with him until after a full consideration of the case to determine the question of his guilt. This is an established right of the defendant, and must be given to the defendant, in good faith by each and every one of you."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted, as heretofore appears.

157

II.

"I charge you that it is not necessary for the defendant to prove his innocence, but it is absolutely necessary for the prosecution to prove his guilt to a moral certainty beyond all reasonable doubt."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted as heretofore appears.

III.

"I charge you that in every crime or public offense there must exist a union or joint co-operation of act and intent. The intent must be a criminal intent. Hence, an act done may be wrong and injurious, but if it is not done with a criminal intent, it is not a crime and cannot be made a basis of the conviction, and unless the evidence satisfies you beyond a reasonable doubt that the defendant had a criminal intent in the doing of the particular acts complained of, it will be your duty to find him not guilty."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there duly excepted.

IV.

"I charge you that you cannot convict the defendant upon mere suspicions, however strong they may be. The defendant can only be convicted upon evidence, and only when the evidence is
158 such as established his guilt to a moral certainty and beyond all reasonable doubt."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there duly excepted.

V.

"I charge you that although you should believe from the evidence that the defendant testified falsely in the proceedings referred to in the indictment, nevertheless, you cannot find him guilty un-

less you further find from the evidence adduced here that such false testimony was given by him corruptly. In other words, the mere fact that the defendant gave false testimony is not alone sufficient to authorize a conviction."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted as heretofore appears.

VI.

"I charge you that to constitute the crime of perjury, the testimony or statement must not only be false but the party making the same must himself believe it to be false. In other words, the defendant must know that he was giving false testimony.

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted as heretofore appears.

159

VII.

"I charge you that the defendant cannot be convicted of perjury unless he willfully and corruptly gave false testimony. If he swore honestly to a fact or belief, with probable cause, according to his own lights, to the best of his belief, he is not guilty of perjury though his oath was really untrue."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted, as heretofore appears.

VIII.

"I charge you that perjury can only be imputed upon full knowledge of the falsity of the testimony, and cannot be predicated where willfulness, corruption and malice are not manifest. A misconception or a mistake is not enough to warrant a conviction of perjury."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted, as heretofore appears.

IX

"I charge you that the taking of a false oath must be both willful and corrupt. Testifying falsely by mistake, however negligently, inconsiderately or recklessly, is not perjury."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted, as heretofore appears.

160

X.

"It is not incumbent upon the defendant to prove his innocence, nor is it incumbent upon him to explain suspicious circumstances even if any can be said to exist. The burden of proof never shifts to him to explain anything. In cases of this character he has a right to stand mute and demand that the Government make the case against him beyond a reasonable doubt. You must indulge in no presumption against him because of his failure to take the

stand. There is nothing in these circumstances to warrant you in drawing any inference against him. It is elementary law that the defendant is not required to take the witness-stand, and that no presumption can be indulged in against him by reason of his failure to testify in the case."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there duly excepted.

XI.

"I charge you that the evidence in this case is entirely insufficient to warrant a verdict of guilty, and hence your verdict will be not guilty."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted, as heretofore appears.

XII.

"I advise you to return a verdict of not guilty for the rea-
161 son that the evidence is insufficient to warrant a verdict of guilty against the defendant."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted, as heretofore appears.

XIII.

"I hereby instruct you that it is the right of the defendant not to take the stand and to testify in his own behalf, but that he may rely solely and entirely upon the Government proving his guilt beyond all reasonable doubt."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted, as heretofore appears.

XIV.

"I charge you that if a person comes to the United States with the intention of becoming a citizen and after that sails on American vessels from the United States and returning to the United States, his abode on such vessels is a residence within the United States. In other words, his being on American vessels after arriving in the United States, with the intention of becoming a citizen of the United States, constitutes a residence within the United States. . .

That the said Court refused to give the said instructions, to which ruling the said defendant then and there duly excepted.

162 XV.

"I charge you that if you believe the testimony of the witness Frank Werta, then that said witness was an accomplice in crime with the defendant; and I instruct you that before you can convict said defendant the testimony of the witness Frank Werta should be corroborated by the testimony of at least one witness or strong corroborative circumstances."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there duly excepted.

XVI.

"I instruct you that the defendant's plea of not guilty is a complete denial of the charge made against him and puts in issue all the evidence submitted against him, if you should find that any has been submitted against him."

That the said Court refused to give the said instruction, to which ruling the said defendant then and there excepted, as heretofore appears.

That after receiving the charge of the Court, the jury retired and subsequently came into court and returned a verdict finding the defendant guilty as charged in the third count in the indictment, and recommending him to the mercy of the Court.

That to said verdict, the defendant then and there duly excepted.

163 That thereafter the said defendant having been called before said court for judgment, and having been duly arraigned for judgment, his counsel thereupon made in open court a motion for a new trial on behalf of the said defendant and upon the following grounds:

I.

That the Court erred in refusing to give certain instructions of law requested by defendant.

II.

That the Court erred in giving certain instructions of law.

III.

That the Court erred in modifying certain instructions of law requested by the defendant.

IV.

That the Court gave certain instructions of law which were erroneous.

V.

That the Court erred in failing to give certain instructions of law.

VI.

That the Court erred in failing to instruct the jury to acquit the defendant.

VII.

That the verdict is contrary to the evidence.

164 VIII.

That the evidence was insufficient to justify the verdict.

IX.

That the verdict is contrary to law.

X.

That the third count of the indictment fails to state an offense.

XI.

Misconduct of the Court and its officials in permitting the jury, upon retiring to deliberate on a verdict, to take with them and keep during all their deliberations in the jury-room the indictment in the case, upon the back of which was endorsed the verdict of another jury upon a previous trial had on said indictment.

XII.

Misconduct of the jury in taking with them and keeping — all their deliberations in the jury-room, indictment in the case, upon the back of which was endorsed the verdict of another jury upon a previous trial had on the said indictment.

That, in support of said motion for a new trial, the attorney for the defendant presented to the Court and asked leave to file the affidavits of Charles C. Carpenter and George R. Armstrong, two of the jurors in said case, to which the attorney for the United States objected, which objection was sustained by the Court, to
165 which ruling the defendant then and there du-y excepted.

That thereupon, in further support of said motion for a new trial, the attorney for the defendant introduced and asked leave to file the affidavit of Marshall B. Woodworth, the attorney for the defendant.

No objection being made to the filing of said affidavit by the attorney for the United States, the same was directed to be filed by the Court and was read to the Court and was considered by the Court in passing upon said motion for a new trial.

That the said motion for a new trial was fully argued before said Court by the attorney for the defendant, and the attorney for the United States, and was thereupon submitted to the Court for its decision.

That after the submission of said motion for a new trial and before the same was determined by the Court, the Court directed that the affidavits of the jurors, Chas. C. Carpenter and Geo. R. Armstrong, be filed and stated that it would consider said affidavit in determining said motion for a new trial.

That thereupon, the said Court denied the said motion for a new trial, to which ruling the said defendant then and there duly excepted.

That the affidavit of Marshall B. Woodworth is as follows, to wit:

166 In the District Court of the United States in and for the Northern District of California.

No. 4362.

THE UNITED STATES
vs.
GUSTAVE HOLMGREN.

Affidavit of Marshall B. Woodworth.

CITY AND COUNTY OF SAN FRANCISCO,
State and Northern District of California, ss:

Marshall B. Woodworth, being duly sworn, deposes and says: That he is an attorney at law; that he appeared as attorney for the defendant in the above-entitled case; that on the 13th day of July, 1906, the Court charged the jury in the above-entitled case, and the jury withdrew to the jury-room for their deliberations; that the deputy clerk of the Court handed to the jury the indictment in the above-entitled case; that said indictment was taken by the jury to the jury-room and was kept in the jury-room and with the jury until they had arrived at a verdict and reported their verdict to the Court; that upon said indictment the fact was stated that the defendant was found guilty upon the third count of the indictment at a previous trial of the case; that said deponent assigns the action of the
167 deputy clerk in handing said indictment to the jury as error prejudicial to the defendant; that said deponent hereby refers to the indictment and records on file herein in support of this affidavit; that said deponent did not notice the action, and was not aware of the action of the deputy clerk in handing the indictment to the jury; that when the deputy clerk did hand certain papers to the jury before retiring to deliberate on a verdict deponent thought that they were simply forms of verdict to be returned by the jury; that he was only apprised of the action of the deputy clerk, and of the Court in permitting the indictment to be handed to the jury and to be kept by them during their entire deliberations, several days after the verdict had been rendered, in the course of a conversation with one of the jurors in the case.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me, this 25 day of July, 1906.

[SEAL.] JOHN FOUGA,
Deputy Clerk U. S. District Court,
Northern District of California.

That the affidavits of Charles C. Carpenter and George R. Armstrong are as follows, to wit:

168 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES
vs.
GUSTAV HOLMGREN.

Affidavit of George R. Armstrong.

CITY AND COUNTY OF SAN FRANCISCO,
State and Northern District of California, ss:

Geo. R. Armstrong, being duly sworn, deposes and says:
That he was one of the jurors in the above-entitled case; that when the jury retired to deliberate upon their verdict the deputy clerk of the Court handed to one of their number the indictment in the above-entitled case; that said indictment was taken by the jury to the jury-room and was retained by them during their entire deliberations in the case; that, during the course of their deliberations, said indictment with the endorsements thereon was read by the jury.

GEO. R. ARMSTRONG.

Subscribed and sworn to before me this 23 day of July, 1906.

[SEAL.] JOHN FOUGA,
Deputy Clerk U. S. District Court,
Northern District of California.

169 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES
vs.
GUSTAV HOLMGREN.

Affidavit of Charles C. Carpenter.

COUNTY OF ALAMEDA,
State and Northern District of California, ss:

Chas. C. Carpenter, being duly sworn, deposes and says:
That he was one of the jurors in the above-entitled case; that when the jury retired to deliberate upon their verdict the deputy clerk of the Court handed to one of their number the indictment in the above-entitled case; that said indictment was taken by the jury to the jury-room and was retained by them during their entire deliberations in the case; that during the course of their deliberations, said indictment with the endorsements thereon was read by the jury. That it appeared from one of the indorsements on said indictment that the defendant had previously been found guilty of the same charge upon which he was being tried by the jury of which your deponent

was a member. That the fact appearing on said indictment
170 created an unfavorable opinion against said defendant in the mind of your deponent.

CHAS. C. CARPENTER.

Subscribed and sworn to before me, this 24th day of July, 1906.

A. E. JOHNSTONE,
Deputy County Clerk in and for Alameda County, State of California.

That thereupon, the said defendant made, presented and filed his motion in arrest of judgment herein, upon the following grounds:

I.

That the third count of the indictment does not state facts sufficient to constitute an offense.

II.

That the Court has no jurisdiction of the subject matter of the charge, or of the person of the defendant.

That after argument the said Court denied the said motion in arrest of judgment, to which ruling the said defendant then and there duly excepted.

That the said Court thereupon pronounced its judgment, wherein and whereby it sentenced the said defendant to imprisonment in the State Prison of the State of California, at San Quentin, for the period of three years, and imposed a fine of three hundred dollars.
171 That to said judgment, the said defendant then and there duly excepted.

Be it further remembered, that upon the defendant being arraigned and being called upon to plead to the indictment herein, he made, filed and presented his demurrer to said indictment upon the following grounds:

I.

That the said indictment fails to state facts sufficient to constitute an offense against the laws of the United States.

II.

That the said indictment does not state facts sufficient to constitute an offense against the United States in this: That it fails to state the nationality of the persons referred to in said indictment as applicants for citizenship.

III.

That it does not appear from the first count of said indictment, that any declaration of intention was ever made by said Harry Johnson to become a citizen of the United States.

IV.

That it does not apear, nor is there any allegation in said first count of said indictment, that the said Harry Johnson, the applicant therein mentioned, had not resided in the United States for the period of five years prior to the making of said application of Harry
172 Johnson to be admitted a citizen of the United States; that it does not appear from said first count of said indictment that said Harry Johnson had not resided in the United States continuously during the three years next preceding his arrival at the age of twenty-one years.

V.

That it does not appear from the second count of said indictment, that any declaration of intention was ever made by said Tonnes Berensen to become a citizen of the United States.

VI.

That it does not appear from the second count of the indictment, nor is there any allegation therein contained, that the said Tonnes Berensen, the applicant therein mentioned, had not resided in the United States for the period of five years prior to the making of said application of Tonnes Berensen to be admitted a citizen of the United States; that it does not appear from said second count of the indictment that said Tonnes Berensen had not resided in the United States continuously during the three years next preceding his arrival at the age of twenty-one years.

VII.

That it does not appear from the third count of said indictment, that any declaration of intention was ever made by Frank
173 Werta to become a citizen of the United States.

VIII.

That it does not appear, nor can it be ascertained from the third count of the indictment that the said Frank Werta, the applicant therein mentioned, had not resided in the United States for the period of five years prior to the making of said application of Frank Werta to become a citizen of the United States; that it does not appear from said third count of said indictment that the said Frank Werta had not resided in the United States continuously during the three years next preceding his arrival at the age of twenty-one years.

IX.

That each and every count of said indictment is indefinite and uncertain in the particulars specified in subdivisions III, IV, V, VI, VII and VIII of this demurrer.

X.

That this Court has no jurisdiction for the reason that the alleged offenses sought to be set out are exclusively matters of state cognizance.

XI.

That there is no statute conferring jurisdiction on the United States District Court for the alleged offense sought to be set out in the indictment filed herein.

174 That the said Court overruled the said demurrer, to which ruling the said defendant then and there duly excepted.

The foregoing bill of exceptions is hereby, on this 18th day of August, A. D. 1906, settled, allowed, and certified to be correct. And I do further certify that the defendant's proposed bill of exceptions was, after due notice of counsel representing the United States, presented to me for settlement on August 18, 1906, during the same term of the Court at which the said action was tried. And I do further certify that the proposed bill of exceptions constitutes, with the consent of counsel representing the United States, the bill of exceptions as settled, allowed, engrossed, and certified by me to be correct.

JOHN J. DE HAVEN,
U. S. District Judge.

The foregoing bill of exceptions is hereby approved as correct. August 18, 1906.

FRANK A. DURYEA,
Spl. Asst. U. S. Att'y.

[Endorsed]: Filed August 18th, 1906. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

Bond for Costs.

Know all men by these presents, that we, Gustav Holmgren as principal, and John S. Drum and Martin Aronsohn, as

175 sureties, are held and firmly bound unto the United States in the full and just sum of seven thousand five hundred ($7,500) dollars, and the further sum of five hundred ($500) dollars, to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 6th day of October, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a District Court of the United States, for the Northern District of California, in a suit depending in said Court, between the United States and Gustav Holmgren, wherein said Holmgren was charged with the crime of perjury, and was thereafter brought to trial on said charge before a jury, and was found guilty and sentenced to pay a fine of $300 and to be imprisoned at hard labor for the term of three years in the State Prison of the State of California, at San Quentin, Marin County, California, and whereas after such conviction said Holmgren sued out in the United States Circuit Court of Appeals for the Ninth Circuit a writ of error to said District Court for the Northern District of California, and whereas by an order made by the Honorable John J. De Haven, Judge of

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the United States District Court for the Northern District of California on the 9th day of August, 1906, the said Holmgren
176 has been admitted to bail pending the said determination in said United States Circuit Court of Appeals for the Ninth Circuit of said writ of error, in the sum of seven thousand five hundred dollars, and the bond for the payment of costs upon said writ of error has been fixed in the sum of two hundred and fifty dollars—

Now, the condition of the above obligation is such, that if the said Gustav Holmgren shall personally appear, and render himself in judgment on the final determination in said United States Circuit Court of Appeals for Ninth Circuit, of said writ of error, at and before the said District Court of the United States aforesaid, or whenever or wherever he may be required to answer said judgment and all matters and things that may be objected against him, whenever the same may be prosecuted and render himself amenable to any and all lawful orders and process in the premises and not depart the said District Court and said District without leave first obtained, and if said writ of error shall be dismissed, and shall appear and render himself in execution of the judgment herein, then the above obligation to be void; else to remain in full force and virtue.

GUSTAV HOLMGREN. [SEAL.]
JOHN S. DRUM. [SEAL.]
MARTIN ARONSOHN. [SEAL.]

177 Acknowledged before me the day and year first above written.

[SEAL.] J. S. MANLEY,
United States Commissioner for the Northern District of California, at San Francisco.

UNITED STATES OF AMERICA,
Northern District of California, ss:

John S. Drum and Martin Aronsohn being duly sworn, each for himself, deposes and says that he is a freeholder in said District, and is worth the sum of seven thousand seven hundred and fifty dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JOHN S. DRUM.
MARTIN ARONSOHN.

Subscribed and sworn to before me, this 6th day of October, A. D. 1906.

J. S. MANLEY,
United States Commissioner for the Northern District of California, at San Francisco.

[Endorsed:] Form of Bond and Sufficiency of Sureties Approved. Robt. T. Devlin, U. S. Attorney.

Filed October 6th, 1906. Jas. P. Brown, Clerk. By John Fouga, Dep. Clerk.

PAGES

178 *Writ of Error (Copy).*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States, defendant in error, a manifest error hath happened, to the great damage of the said Gustav Holmgren, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 8th day of September next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according
179 to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 9th day of August, in the year of our Lord one thousand nine hundred and six.

JAMES P. BROWN,
Clerk of the United States District Court,
Northern District of California.
By JAMES S. MANLEY,
Deputy Clerk.

Allowed by
JOHN J. DE HAVEN.

[Endorsed:] Lodged for Def't in Error in the Clerk's Office, U. S. Dis't Court this 21st day of Sept., 1906. Jas. P. Brown, Clerk. By John Fouga, Dep. Cl'k.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA,
Northern District of California, ss:

I, James P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of one

hundred and thirty-three pages, numbered from 1 to 133,
180 inclusive, is a true and complete transcript of the records, proceedings, pleadings, orders, judgment and other proceedings in said case, and of the whole thereof, as appears from the original records and files of said court, made up pursuant to præcipe filed by plaintiff in error. And I further certify and return that I have annexed to said transcript, and include within said paging the original citation, writ of error, and proof of service thereof: I further certify that a true copy of the writ of error was lodged with me for the defendant in error on September 21st, 1906.

I further certify that the cost of said record, amounting to sixty-four dollars and ten cents ($64.10), has been paid by plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at San Francisco, in the Northern District of California, this 9th day of October, A. D. 1906, and of the Independence of the United States the one hundred and thirty-first.

[SEAL.] JAS. P. BROWN, *Clerk*.
By J. S. MANLEY, *Deputy Clerk*.

181 [Endorsed:] No. 1382. United States Circuit Court of Appeals for the Ninth Circuit. Gustav Holmgren, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Northern District of California.

Filed October 9, 1906.

F. D. MONCKTON, *Clerk*.

182 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and eighty-one (181) pages, numbered from one (1) to one hundred and eighty-one (181), inclusive, to be a true copy of the printed Transcript of Record upon writ of error to the United States District Court for the Northern District of California, in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals in the city of San Francisco, State of California, this twenty-third day of March, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

183 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

ADDENDA.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

184 At a Stated Term, to wit, the October Term, A. D. 1906, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Court-room, in the City and County of San Francisco, on Wednesday, the Twenty-ninth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Seven.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable John J. De Haven, District Judge; Honorable William H. Hunt, District Judge.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Order of Submission.

Upon motion of Mr. Benjamin L. McKinley, Assistant United States Attorney, and counsel for the defendant in error, counsel for the plaintiff in error consenting thereto, ordered, above-entitled cause submitted to Gilbert and Ross, Circuit Judges, and Hunt, District Judge, for consideration and decision on briefs.

185 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Marshall B. Woodworth, for the Plaintiff in Error.

Robert T. Devlin, United States Attorney, Benjamin L. McKinley, Assistant United States Attorney, and Frank A. Duryea, Special Assistant United States Attorney, for the Defendant in Error.

Before Gilbert and Ross, Circuit Judges, and Hunt, District Judge.

GILBERT, Circuit Judge, delivered the opinion of the Court.

The plaintiff in error was indicted for violation of section 5395 of the Revised Statutes. The indictment contained three counts, each count charging the plaintiff in error with the commission of perjury when testifying as a witness in three separate naturalization proceedings. He had two trials in the court below. On the first trial he was acquitted on counts one and two, and convicted
186 on count three. The perjury of which he was convicted on the third count consisted in swearing that he had known in the United States the applicant for citizenship for five years prior to the application, whereas, as alleged in the indictment, he had not known him for more than four years prior to said application. He was granted a new trial and on the second trial he was convicted under the third count and recommended to the mercy of the Court. A motion for a new trial was made and denied. A motion in arrest of judgment was also denied.

One of the errors principally relied upon is that the District Court permitted the jury to take with them and keep during all of their deliberations in the jury-room the indictment, upon which was indorsed the verdict of the jury on the previous trial, finding the plaintiff in error guilty on the third count of the indictment. This assignment of error cannot avail the plaintiff in error for the reason that the matter was not brought to the attention of the Court at any time until after a verdict was returned, the submission of the indictment with the indorsement thereon to the jury having been an accident for which counsel for plaintiff in error was as much accountable as was any one. Said the Court of Appeals for the 8th Circuit in St. Louis S. W. Ry. vs. Henderson, 58 Fed. 530: "It is the province of an Appellate Court to review the rulings of
187 the Trial Court on questions actually brought to the attention of the Court and decided by it." And in Manufacturing Co. vs. Joyce, 54 Fed. 232, it was said: "The rule is well established

that the Appellate Court will only permit those matters to be assigned for error that were brought to the attention of the court below during the progress of the trial and then passed upon." In Railway Co. vs. Heck, 102 U. S. 120, Chief Justice Waite said: "Our power is confined to exceptions actually taken at the trial. The theory of a bill of exceptions is that it states what occurred when the trial was going on."

But it is said that the alleged misconduct of the Court and its officers in submitting to the jury the indictment with the indorsement of the former verdict thereon, is ground for reversal in this court under another assignment of error, which is that the trial Court denied the motion of plaintiff in error for a new trial. It is shown in the record by affidavits in support of the motion for a new trial that the indictment was delivered by a bailiff to the jury when they retired to consider their verdict and that there was indorsed thereon: "Tried April 5-6-7, 1906. Verdict, not guilty on the 1st and 2d counts of indictment, and guilty on the 3d count of the indictment. April 13, 1906. New trial granted." The attorney for the plaintiff in error stated in his affidavit that he had no
188 knowledge that the indictment had been handed to the jury, and that when he saw the deputy clerk hand certain papers to the jury before retiring he thought they were simply forms of verdict for the jury. There was an affidavit of one of the jurors that during the course of the deliberations of the jury, the indictment with the indorsements thereon, was read by the jury, and the affidavit of another juror to the same effect, with the further statement that in his mind the indorsement on the indictment created an unfavorable opinion against the plaintiff in error. This latter portion of the affidavit was not admissible, for the evidence of jurors as to the influences which affected their deliberations is inadmissible either to impeach or support the verdict. Clyde Mattox vs. United States, 146 U. S. 140.

Whether the submission to the jury of an indictment upon which a former conviction is recorded is error for which a judgment should be reversed is a question upon which the decisions are not harmonious. In Green vs. The State, 38 Ark. 304, the Court refused to reverse the judgment on that ground. In 2 Thomp. on Trials, section 2591, it is said: "It is not enough for counsel to show in support of a motion for a new trial that a particular paper was sent to the jury by the adverse party without his knowledge. It is his duty to ascertain what papers are sent to the jury before they leave
189 the court." In Forbes vs. Commonwealth, 19 S. E. 164, the Supreme Court of Appeals of Virginia held that it was not error to send to the jury the indictment whereon is recorded the verdict of "guilty" of a former jury where no objection is made until after the verdict. In State vs. Shores, 7 S. E. 413, the Court, in refusing to reverse a judgment on that ground, said: "The jury had seen the indictment with the indorsement, before any motion was made with reference thereto. Every member of the jury may have been in court and heard the verdict read against Hall and still that would not have disqualified

them as jurors." In Cargill vs. The Commonwealth, 20 S. W. 782, the Court said: "But the appellant made no objection, and it was his business as well as that of the other side to see that the proper papers were taken by the jury, and it not being done, to call the Court's attention to it. By proper vigilance upon his part, his rightful objection would have been available to him." In State vs. Tucker, 52 At. 741, it was held that the failure to remove the record of the judgment of conviction given to the jury, or to direct them not to regard it, was not prejudicial to the defendant where no objection was made until after the verdict. The Court said: "It is the duty of counsel as well as of the Court to ascertain what papers are delivered to the jury." In Smalls vs. The State, 31 S. E. 571, the Court said: "If a party desires a verdict rendered at a former
190 trial of the same case concealed from the inspection of the jury, he should present a request to this effect." In Sanders vs. The State, 31 So. 564, the Court found no error in giving to the jury the indictment on which was recorded the verdict of a former jury, and so held on the ground that the statute requires that the indictment should be taken by the jury on their retirement to consider their verdict. In Hjeronymus vs. The State, 83 S. W. 708, the statute forbade reference to a former trial and conviction or any allusion to it, but the Court held that there was *so* error in the case under consideration, as it was not made to appear that the jury was aware of the existence of the former verdict until after they had agreed to convict, nor was it shown that the former verdict was used by them in arriving at their verdict. In Harvey vs. The State, 34 S. W. 623, the Court said: "In our opinion the weight of the testimony in this regard is to the effect that the jury who tried the case did not notice or read or attempt to read the obliterated verdict, and if they had done so, in the absence of some showing of injury to appellant, we could not consider this as fundamental error, or such error as ought to have authorized the court below to grant a new trial." In Anschicks vs. The State, 6 Tex. App. 524, the Court said: "It was the business of counsel to see to it that the jury were permitted to carry with them such papers as were
191 proper to be used in their retirement." In Ogden vs. The United States, 112 Fed. 523, however, the Circuit Court of Appeals for the Third Circuit held that the fact that on the retirement of the jury in a criminal case, an officer of the court handed to them the indictments on which the defendant was tried, which were taken into the jury-room with other papers for their consideration, and that indorsed on the back of each indictment was the verdict of a former jury finding the defendant guilty as charged therein, was such a violation of the rights of the defendant as to entitle him to a new trial, and that it was not incumbent upon him to show that such indorsements were actually read by the jurors or any of them. In that case the right of the defendant against whom a verdict of guilty had been rendered on the second trial, to move for a new trial and to have that motion considered on the reasons presented for it, had been denied by the trial Court. That right was held to be an absolute one, the granting or refusal of which did not rest in

the discretion of the Court. Therein lies the important and essential difference between that case and the case at bar. In the Ogden case, the trial Court refused to permit the filing of a motion for a new trial, offered in due time, or to consider it or the affidavits offered in its support. The Circuit Court of Appeals said:
192 "It is not disputed that in the courts of the United States the allowance or refusal of a new trial rests in the sound discretion of the Court to which the application is addressed, and that the result cannot be made the subject of review by writ of error. The gravamen of the case, however, made by the plaintiff in error is that the Court below declined to exercise its discretion at all in refusing the motion for a new trial and excluding from its consideration the reasons filed in support thereof." In the case at bar the Court below entertained the motion for a new trial and considered the affidavits which were filed in its support. The determination of a motion for a new trial involves the exercise of a wide discretion and a knowledge and appreciation of a case which ordinarily can be possessed only by the trial judge. It is for this reason that his ruling on the motion will not be reviewed in an Appellate Court, and this rule applies as well to a motion for a new trial presented on affidavits showing matters which occurred after the retirement of the jury to consider their verdict, as to other grounds for a new trial. Kerr vs. Clampitt, 95 U. S. 188; Board of Commissioners vs. Keene Savings Bank, 47 C. C. A. 464-476; Illinois Cent. R. Co. vs. Coughlin, 75 C. C. A. 262; Clyde Mattox vs. United States, 146 U. S. 140. In the case last cited the motion for a new trial was based on affidavits showing that communications had been made to the jury by the bailiff, and that certain newspapers
193 had been read by the jury while considering their verdict. The Court, while recognizing and affirming the rule that the allowance or refusal of a new trial rests in the sound discretion of the Court to which the application is addressed, and cannot be made the subject of review by writ of error, held that the case then under consideration was taken out of the rule for the reason that the trial Court had excluded the affidavits and had refused to exercise any discretion in respect to the matters stated therein. In Kerr vs. Clampitt, the Court said: "If the new trial be asked for irregularity in the proceedings of the court, jury or adverse party, or for abuse of discretion by which either party was prevented from having a fair trial, or for misconduct of the jury, or accident or surprise which ordinary prudence could not have guarded against, or for newly discovered evidence, the application must be made upon affidavits. * * * But whether the application be made upon affidavits, or a statement thus prepared, the rulings thereon, whether of the District Court originally, or of the Supreme Court of the Territory on appeal, are not subject to review by this tribunal. We have no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous
194 its decision." In Louisville S. W. Ry. Co. vs. Sumner, 125 Fed. 719, the Circuit Court of Appeals for the Sixth Circuit

said: "It has often been said by this Court that it will not review the action of the lower Court in its disposition of a motion for a new trial or other matters addressed to its discretion, but we have held that for a refusal to exercise its discretion on a motion of which it should take cognizance a writ of error will lie." In view of these authorities and the nature of the facts which were so presented in the affidavits on the motion for a new trial in the present case, we cannot see that the ruling of the Court below in denying the new trial, in the exercise of the discretion which was vested in that Court, is subject to review in this.

It is assigned as error that the Court failed to warn the jury of the danger in convicting a defendant on the testimony of an accomplice. This assignment is based upon the theory that Frank Werta, the applicant for citizenship, was an accomplice with the plaintiff in error who made the false oath. An accomplice is "one who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime." People vs. Bolanger, 71 Cal. 19; State vs. Roberts, 15 Ore. 197. To render one an accomplice, "he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the crim-
195 inal transaction." People vs. Smith, 28 Hun, 626. Mere knowledge on the part of a witness that the defendant purposes to commit a crime or does commit a crime, does not render the witness an accomplice. There is nothing in the evidence in the bill of exceptions to show that Frank Werta was an accomplice within these generally accepted definitions. There is no evidence that he solicited the plaintiff in error to make the oath concerning his residence in the United States, or suggested the facts which were sworn to or assisted him in or incited him to the commission of the offense. On the other hand, the evidence conveys the impression that the affidavits as to the time Werta's residence in the United States were furnished not at his own, but at the instigation of others. Under the circumstances we think it would have been error to caution the jury on the theory that Werta's testimony was that of an accomplice.

It is said that the Court erred in failing to charge the jury that the perjury must be corrupt and malicious, as well as knowing and willful. Section 5395 of the Revised Statutes, under which the plaintiff in error was indicted, denounces a penalty against one "who knowingly swears falsely in making any oath under any law relating to naturalization." The Court in charging the jury
196 instructed them that they must be satisfied beyond all reasonable doubt not only that the testimony alleged to be given was false, but that it was willfully and knowingly false, "that he willfully and knowingly testified falsely." This was clearly sufficient. It was not necessary in order to commit the defense defined in the statute that there should have been any purpose of gain or any instigation of malice. In United States vs. Edwards, 43 Fed. 67, it was held that an indictment under the statute must allege that

the false oath was taken willfully, and that an allegation that it was corruptly taken does not embrace the element of willfulness.

Error is assigned to the refusal of the Court to instruct the jury that they could not convict the defendant upon mere suspicion, however strong, but only upon evidence establishing his guilt to a moral certainty and beyond a reasonable doubt. The instruction so requested would have been proper, but the Court was not bound to adopt it in the precise form in which it was presented, and there was no error in refusing it in view of the fact that the Court properly instructed the jury that the defendant was presumed to be innocent, that they would not be justified in returning a verdict of guilty unless they were satisfied to a moral certainty and after a consideration of all the evidence, that he was guilty, and said: "You are
further charged that you cannot convict the defendant upon
197 his statements, admissions or actions alone. Independently
of his statements or actions, there must be other evidence tending to show that the crime has been committed," and further said that it was incumbent upon the Government to prove the guilt of the defendant beyond a reasonable doubt and by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances with reference to each assignment of perjury.

It is contended that the Court erred in refusing to instruct the jury as follows: "Where a person who is a mariner comes to the United States, and afterwards follows his business as a mariner, if he has the intention of becoming a citizen of the United States, his abode on American vessels would constitute a residence in the United States." The difficulty in the way of giving this instruction was that there was no testimony which warranted it. There is nothing in the evidence to show that Werta was serving upon American vessels prior to March, 1901. It is true that he had come to the United States in 1899 as a member of the crew of a Finnish ship, upon which ship he had signed articles for a round trip voyage to return to London, that while on said ship he remained at Mobile, Alabama, about three months, and that thereafter he sailed away to Buenos Ayres on the same ship. His remaining for that period
of time in the United States on a foreign vessel with-
198 out having formed the intention to remain in the United
States, constituted no residence in the United States. The instruction was properly refused.

It is assigned as error that the Court sustained the objection of the District Attorney to the introduction in evidence of a document purporting to be the application and affidavit of Frank Werta to the local Board of Inspectors, which was offered for the purpose of impeaching Werta's testimony. The Court ruled that the affidavit did not contradict the testimony of the witness. We cannot say that there was error in the ruling, for the affidavit is not embodied in the bill of exceptions.

It is contended that the Court erred in overruling the demurrer of the plaintiff in error, and his motion in arrest of judgment on the ground that the Court was without jurisdiction since the alleged offense was committed in naturalization proceedings in a State

court. We held otherwise in Schmidt vs. United States, 133 Fed. 257.

The judgment is affirmed.

[Endorsed:] No. 1382. United States Circuit Court of Appeals for the Ninth Circuit. Gustav Holmgren vs. The United States of America. Opinion. Filed Oct. 14, 1907. F. D. Monckton, Clerk.

199 United States Circuit Court of Appeals for the Ninth Court.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Endorsed:] Judgment. Filed and entered October 14, 1907. F. D. Monckton, Clerk.

200 At a Stated Term, to wit, the October Term A. D. 1907, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Courtroom, in the City and County of San Francisco, on Monday, the Twenty-fourth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Eight.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Order Denying Petition for a Rehearing, etc.

It is ordered that the petition for a rehearing in the above-entitled cause be, and hereby is, denied.

Upon motion of Mr. Marshall B. Woodworth, counsel for the plaintiff in error, it is further ordered that the issuance of the mandate of this Court in the above-entitled cause be, and hereby is, stayed for a period of sixty (60) days from date.

201 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing nineteen (19) pages, numbered from one (1) to nineteen (19), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the Printed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals in the city of San Francisco, State of California, the twenty-third day of March, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

202 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Gustav Holmgren is plaintiff in error and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the
203 Supreme Court of the United States do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of April, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

204 [Endorsed:] File No. 21,121. Supreme Court of the United States. No. 718, October Term, 1907. Gustav Holmgren vs. The United States. Writ of Certiorari. Docketed. No. 1382. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 4, 1908. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

205 United States Circuit Court of Appeals for the Ninth Circuit.

GUSTAV HOLMGREN, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

It is hereby stipulated and agreed that the certified Transcript of Record now on file in the Supreme Court of the United States may be taken as, and may constitute, a return to the Writ of Certiorari issued by the Supreme Court of the United States on April 27th, 1908, directed to the United States Circuit Court of Appeals for the Ninth Circuit.

It is further stipulated that, in making his return to said writ, the clerk of said Circuit Court of Appeals is requested to annex thereto a certified copy of this stipulation in lieu of a certified copy of tne record.

MARSHALL B. WOODWORTH.
Attorney for Petitioner.
WM. M. MADDEN,
Of Counsel for Petitioner.
ROB'T T. DEVLIN,
Attorney for Respondent.

(Endorsed:) Docketed. No. 1382. United States Circuit Court of Appeals for the Ninth Circuit. Gustav Holmgren, Petitioner, vs. United States of America, Respondent. Stipulation for Return to Writ. Filed May 11, 1908. F. D. Monckton, Clerk. Marshall B. Woodworth, Attorney for Petitioner, Montgomery Block, San Francisco, Cal.

206 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk United States Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the annexed pre-

ceding page, numbered one (1), to be a true copy of a stipulation as to the return to the writ of certiorari filed in the above-entitled cause on the 11th day of May, A. D. 1908, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, this twelfth day of May, A. D. 1908, in the City of San Francisco, in the State of California.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit.

207 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1382.

GUSTAV HOLMGREN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, Clerk of the said the United States Circuit Court of Appeals for the Ninth Circuit, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send without delay to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this twelfth day of May, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed:] 718. 21121.

[Endorsed:] File No. 21,121. Supreme Court, U. S. October Term, 1907. Term No. 718. Gustav Holmgren, Petitioner, vs. The United States. Writ of Certiorari and return. Filed May 21st, 1908.

Supreme Court of the United States

October Term, 1909.

GUSTAV HOLMGREN,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

No. 132

OPENING BRIEF ON BEHALF OF PETITIONER

POINTS RELIED ON.

The petition for a writ of certiorari, granted by this Honorable Court in October, 1908, was based on four grounds:

FIRST. A conflict of decisions between the Circuit Court of Appeals for the Third Circuit and the Cir-

cuit Court of Appeals for the Ninth Circuit, from which latter Court this petition for a writ of certiorari was prosecuted.

The Circuit Court of Appeals for the Third Circuit held in the case of *Ogden* vs. *United States,* 112 Fed. R. 523, that it was "a gross violation of the rights of the defendant" to give to the jury an indictment, containing information of the adverse result of a previous trial, and that it would be presumed that prejudice had been generated by such misconduct.

The Circuit Court of Appeals for the Ninth Circuit, in the case here presented, refused to coincide with the law as laid down by the Circuit Court of Appeals for the Third Circuit in the case of *Ogden* vs. *United States, supra.*

SECOND. On the question of jurisdiction, the Circuit Court of Appeals for the Ninth Circuit held in this case that the Federal Court had jurisdiction of the perjury committed in the State Court in a naturalization proceeding. It so held on the strength of a prior decision rendered by it in the case of *Schmidt* vs. *United States,* 133 Fed. R. 257. In that case Hon. E. M. Ross, one of the members of the Court who sat in this case in the Circuit Court of Appeals, dissented and filed an elaborate opinion. Therefore, as to the question of jurisdiction, the authority relied upon to sustain

the jurisdiction of the Court contains the dissent of one of its members. The decision not being unanimous prompted the petitioner to invoke the review of this Court on the all-important question of the jurisdiction of the United States District Court in this case.

THIRD. The Circuit Court of Appeals for the Ninth Circuit held that the prosecuting witness, one Werta, who had obtained fraudulent papers of naturalization and one of whose witnesses was the petitioner, Holmgren, was not an accomplice in the perjury committed by Holmgren to assist Werta in getting his citizenship papers, and that, not being an accomplice, the District Court properly declined to give any instructions as to the weight which should be accorded to the testimony of an accomplice.

This was urged as a ground for the granting of the petition for a writ of certiorari, and is now urged as a ground for reversal.

FOURTH. It was next claimed, as a reason for granting the issuance of a writ of certiorari, that the trial court should have submitted to the jury, with appropriate instructions, the question whether or not, as a matter of fact, the prosecuting witness Werta was an accomplice with the petitioner Holmgren, and it is now contended that the Circuit Court of Appeals should have reversed the case on that ground, among others.

The question of being an accomplice is one entirely for the jury.

STATEMENT OF THE CASE.

The petitioner was indicted in the United States District Court, Northern District of California, for a violation of Section 5395 of the Revised Statutes of the United States. The indictment contained three counts. He was charged in each of these counts with the offense of perjury while testifying in the State Court as a witness in three separate naturalization proceedings. He had two trials. On the first trial, he was acquitted on counts one and two, and convicted on count three. (See Transcript of Record, p. 76.)

The perjury, with which he was charged and convicted on the third count, consisted in swearing in the State Court in the naturalization proceedings that he had known in the United States the applicant for citizenship, one Frank Werta, for five years immediately prior to the application for citizenship, whereas, as alleged in the indictment, he had not known him for more than four years prior to said application. (Transcript of Record, p. 10.) The petitioner was granted a new trial as to his conviction on the third count. (Transcript of Record, p. 76.) He was subsequently retried on the third count and convicted. A motion for a new trial was made and denied. (Transcript of Record, pp. 80-81.) A motion in arrest of judgment was likewise denied. (Transcript of Record, p. 84.)

ARGUMENT.

I

JURISDICTION.

Offense, if any, Committed in State Court. Has Federal Court Jurisdiction?

While, in the petition for a Writ of Certiorari, the question of jurisdiction was enumerated as the second point raised, yet, in this Opening Brief, it is properly made the first point to be discussed, and the question of "Misconduct" will be taken up as the second point in this Opening Brief.

The question of jurisdiction was raised both by demurrer and by motion in arrest of judgment.

The petitioner was charged with a violation of Section 5395 of the Revised Statutes, in having made a false oath in a naturalization proceeding in the Superior Court of the State of California. The perjury or false oath, if any, was therefore committed in the State Court, and it consisted in the testimony, *orally delivered by the petitioner in the State Court,* as to his knowledge of the number of years during which he had known the applicant for citizenship in the United States and the applicant's residence in the United States.

It is here contended that the Federal Courts have no jurisdiction of the crime of perjury or the taking of a false oath committed in State Courts. While it is true that State Courts entertain jurisdiction in Naturaliza-

tion proceedings, still they *remain State Courts.* Perjury, by a witness in such proceeding, is punishable by the sovereignty whose justice it offends, (viz. the State), and is not punishable in a Federal Court; certainly not in the absence of a Federal Statute.

It is a well settled rule that: "The Courts of the United States have no criminal jurisdiction except that which is given them by the laws of the United States." *United States* vs. *Babcock,* 4 McLean, 113, Fed. cases, No. 14488.

It is maintained, in the first place, that there was no Federal Statute giving the Federal Courts jurisdiction over perjuries or false oaths committed in naturalization proceedings in State Courts; and, secondly, if there were such a Federal Statute, that it would be unconstitutional and void.

The Circuit Court of Appeals for the Ninth Circuit gave no independent consideration in this case to the question of jurisdiction, but simply referred to its previous decision of *Schmidt* vs. *United States,* 133 Fed. Rep. 257.

In that case, the question—whether Congress had enacted a Federal Statute giving the Federal Courts jurisdiction over perjuries and false oaths committed in naturalization proceedings in State Courts—was elaborately and ably discussed. The majority of the Court held that jurisdiction would lie, while one mem-

ber (Hon. E. M. Ross) dissented from the views of his associates and wrote a lengthy and, in our humble judgment, a most convincing opinion to the effect that the Federal Courts had no jurisdiction of the offense of perjury committed in the State Courts.

We can do no better than to make this dissenting opinion a part of our Opening Brief. The learned Judge stated his views as follows:

> "Ross, Circuit Judge (dissenting). The plaintiff in error was indicted and prosecuted for, and convicted of, the crime of perjury, committed in the superior court of the state of Washington for Walla Walla county, in 10 certain naturalization proceedings then and there pending. One of the questions presented by the present appeal, and the first to be considered and disposed of, is in respect to the jurisdiction of the court below over the offense.
>
> "The same question was before Judge Thomas, in the Southern District of New York, in the recent case of the *United States* v. *Severino,* (C. C.), 125 Fed. 949, and was by him quite fully considered, in an opinion in which the jurisdiction of the federal courts was sustained. He reached the conclusion, in which I quite agree—
>
> " 'That state courts, while entertaining jurisdiction in naturalization proceedings, remain state

courts, and that perjury committed by a witness in such a proceeding is punishable by the sovereignty whose justice it offends (that is, the state court), and that the federal court cannot entertain jurisdiction in the absence of a federal statute conferring it.'

"Judge Thomas, in the case cited, further held that section 5395 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3654) is applicable to perjuries committed in naturalization proceedings in the state courts, and therefore sustained the federal jurisdiction of such offenses. In considering that question, it was said by the learned judge:

"'At the first view there would be hesitation in concluding that Congress intended to punish perjuries in naturalization proceedings, committed in a court foreign to its governmental jurisdiction, against another and independent sovereignty, thereby making its penal statutes applicable to offenses committed against the justice of a separate state. But it is precisely what at a time, and for a time at least, it did do, in plainest terms, by Act July 14, 1870, c. 254, 16 Stat. 254 (U. S. Comp. St. 1901, p. 3654).'

"The first subdivision of section 2165, tit. 30, of the Revised Statutes (U. S. Comp. St. 1901, p.

1329), embodying the naturalization laws, is as follows:

"'An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise: First. He shall declare on oath, before a circuit or district court of the United States, or a district or a supreme court of the territories, or a court of record of any of the states having common law jurisdiction and a seal and clerk, two years at least prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.'

"By its Act of July 14, 1870, c. 254, 16 Stat. 254 (U. S. Comp. St. 1901, p. 3654), Congress amended those laws in certain particulars, and for the first time made specific provision for the punishment of crimes committed against them; declaring, among other things, in its first section—

"'That in all cases where any oath, affirmation, or affidavit shall be made or taken under or by virtue of any act or law relating to the naturalization of aliens, or in any proceedings under such acts or laws, and any person or persons taking or making

such oath, affirmation, or affidavit, shall knowingly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof, shall upon conviction thereof be sentenced to imprisonment for a term not exceeding five years and not less than one year, and to a fine not exceeding one thousand dollars;' and in its fourth section, 'that the provisions of this act shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceedings for naturalization shall be commenced, had, or taken, or attempted to be commenced; and the Courts of the United States shall have jurisdiction of all offenses under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed.'

"The provisions of the act of July 14, 1870, were subsequently revised, amended, and carried into the Revised Statutes as sections 5395, 5424, 5425, 5426, 5427, 5428, and 5429 (U. S. Comp. St. 1901, pp. 3654, 3668-3670), which read as follows:

" 'Sec. 5395. In all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit who knowingly swears falsely, shall be punished by imprisonment not more than five years, nor less than one

year, and by a fine of not more than one thousand dollars.'

"'Sec. 5424. Every person applying to be admitted a citizen, or appearing as a witness for any such person, who knowingly personates any other person than himself, or falsely appears in the name of a deceased person, or in an assumed or fictitious name, or falsely makes, forges, or counterfeits any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or who utters, sells, disposes of, or uses as true or genuine, or for any unlawful purpose, any false, forged, ante-dated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or sells or disposes of to any person other than the person for whom it was originally issued any certificate of citizenship, or certificate showing any person to be admitted a citizen, shall be punished by imprisonment at hard labor not less than one year, nor more than five years, or by a fine of not less than three hundred nor more than one thousand dollars, or by both such fine and imprisonment.'

"'Sec. 5425. Every person who uses, or attempts to use, or aids, or assists, or participates in the use of any certificate of citizenship, knowing the same

to be forged, or counterfeit, or ante-dated, or knowing the same to have been procured by fraud or otherwise unlawfully obtained; or who, without lawful excuse, knowingly is possessed of any false, forged, ante-dated, or counterfeit certificate of citizenship, purporting to have been issued under the provisions of any law of the United States relating to naturalization, knowing such certificate to be false, forged, ante-dated, or counterfeit, with intent unlawfully to use the same; or obtains, accepts, or receives any certificate of citizenship known to such person to have been procured by fraud or by the use of any false name, or by means of any false statement made with intent to procure, or to aid in procuring, the issue of such certificate, or known to such person to be fraudulently altered or ante-dated; and every person who has been or may be admitted to be a citizen who, on oath or by affidavit, knowingly denies that he has been so admitted, with intent to evade or avoid any duty or liability imposed or required by law, shall be imprisoned at hard labor not less than one year nor more than five years, or be fined not less than three hundred dollars nor more than one thousand dollars, or both such punishments may be imposed.'

" 'Sec. 5426. Every person who in any manner uses for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise, unlawfully, any order, certificate of citizenship, or cer-

tificate, judgment, or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order or certificate, judgment, or exemplification has been unlawfully issued or made; and every person who unlawfully uses, or attempts to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be punished by imprisonment at hard labor not less than one year nor more than five years, or by a fine of not less than three hundred dollars nor more than one thousand dollars, or by both such fine and imprisonment.'

" 'Sec. 5427. Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made felony, or counsels, advises, or procures, or attempts to procure, the commission thereof, shall be punished in the same manner and to the same extent as the principal party.'

" 'Sec. 5428. Every person who knowingly uses any certificate of naturalization heretofore granted by any court or hereafter granted, which has been or may be procured through fraud or by false evidence, or has been or may be issued by the clerk, or any other officer of the court without any appear-

ance and hearing of the applicant in court and without lawful authority; and every person who falsely represents himself to be a citizen of the United States, without having been duly admitted to citizenship, for any fraudulent purpose whatever, shall be punishable by a fine of not more than one thousand dollars, or be imprisoned not more than two years, or both.'

" 'Sec. 5429. The provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced.'

"It will be observed that, in these revised and amended sections, Congress was dealing specifically with crimes against the naturalization laws. By section 5429 it expressly made the provisions of sections 5424, 5425, 5426, 5427, and 5428 applicable to 'all proceedings had or taken, or attempted to be had or taken, before any court (federal or state) in which any proceeding for naturalization may be commenced or attempted to be commenced.' *Thus having its attention specifically directed to the subject, Congress, in revising and amending the provisions of the act of July* 14, 1870, *omitted the provision of section* 4 *of that act conferring upon the courts of the United States 'juris-*

diction of all offenses under the provisions of this act in or before whatsoever court or tribunal the same shall have been committed,' and made applicable to naturalization proceedings had in the state courts only the provisions of sections 5424, 5425, 5426, and 5427 and 5428,*which do not include the crime of perjury committed in such proceedings in a court of a state. That action of Congress was in accord with the rule declared by the Supreme Court in Loney's Case,* 134 *U. S.* 372, 10 *Sup. Ct.* 584, 33 *L. Ed.* 949, *where it is said that 'the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had.'* (The italics are ours.)

"I am of the opinion that the court below was without jurisdiction of the alleged offense, for which reason I think the judgment should be reversed, with directions to that court to dismiss the indictment." (133 Fed. Rep. 257, *264.*)

We rely, most confidently, upon the correctness of the views expressed in the opinion of the learned Judge who dissented.

Without the slightest disrespect to the majority Court in the case of *Schmidt* vs. *United States,* we think that they did not recognize a well settled rule of statutory construction applicable to penal enactments, and that is

that criminal statutes should not be extended by implication.

Todd vs. *United States,* 158 U. S. 292; 39 L. Ed. 982;

Bolles vs. *Outing Co.* 175 U. S. 262, *264*; 44 L. Ed. 156, *157*.

United States vs. *Harris,* 177 U. S. 305; 44 L. Ed. 780, *782*.

In the case of *Todd* vs. *United States, supra;* the United States Supreme Court, through Mr. Justice Brewer, said: "It is axiomatic that Statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under a Statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the Statutes.' *United States* vs. *Lacher,* 134 U. S. 624 (33:1080) *Endlich, Interpretation of Statutes,* Sec. 329; *Pomeroy's Sedgwick on Statutory and Constitutional Construction* (2nd Ed.) 280."

In *Exparte McNulty* (1888), 77 Cal. 164, *168*, the Supreme Court of California used this language:

"Constructive crimes—crimes built up by Courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law."

See, also, the observations of Mr. Chief Justice Marshall in *United States* vs. *Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37.

The majority of the Court in *Schmidt* vs. *United States, supra,* certainly did not heed and follow this "axiomatic" rule of construction of criminal statutes, in holding that Section 5395 of the Revised Statutes of the United States was, *by implication,* not excluded from the operation of Section 5429 of the Revised Statutes, although the majority Court were compelled to admit that Section 5429 "does not in terms refer to Section 5395." (133 Fed. Rep. 257, *259.*)

This "axiomatic" rule of statutory construction of criminal Statutes is especially applicable to the situation in the case at bar, in view of the fact that it is also a well settled principle of criminal law that "the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly *to the Government in whose tribunals that proceeding is had.*"

In re Loney, 134 U. S. 272; 33 L. Ed. 949, *951,* and cases there cited.

It clearly appears that, by the Act of Congress of July 14, 1870, (16 Stat. 254) entitled: "An Act to amend the naturalization laws, and to punish crimes against the same, and for other purposes," Sec. 1 thereof provided for the punishment of perjury in all naturalization cases

or matters. This Section 1 was the substitute for Section 5395, as amended, of the Revised Statutes, under which the petitioner was indicted and convicted.

By Sec. 4 of the same Act of July 14, 1870, the provisions of that Act, (including, of course, Sec. 1 thereof), were made applicable to all naturalization proceedings "in or before whatsoever Court or tribunal the same shall have been committed." This latter provision included, of course, *State* as well as *Federal* tribunals and left no room to doubt that jurisdiction was thereby attempted to be given to the United States Courts of offenses committed against the naturalization laws in any Court, whether *State or Federal.*

This was the condition of the law as to crimes against the naturalization laws when the Revised Statutes were enacted.

The trend of the legislation on this subject is clearly stated by Judge Ross in his dissenting opinion. (133 Fed. Rep. 264-*266.*)

Upon the enactment of the Revised Statutes, Section 1 of the Act of July 14, 1870, became, as stated, Section 5395, but it was severed from the other three Sections of the Act of July 14, 1870, and was placed in Chapter 4, title 70, which deals with "Crimes against Justice," whereas Sections 2, 3 and 4 were placed in Chapter 5, under the title, "Crimes against the operation of the

Government," and are therein numbered as Sections 5424, 5425, 5426, 5427, 5428 and 5429 of the Revised Statutes.

The latter section (5429) reads as follows:

"The provisions of the *five preceding sections* shall apply to all proceedings had or taken, or attempted to be had or taken, before *any Court* in which any proceeding for naturalization may be commenced or attempted to be commenced."

From its reading, it will be seen that this Section refers specifically to the *five preceding Sections,* and it does not refer to Section 5395 of the Revised Statutes (being Section 1 as amended by the Act of July 14, 1870), the Statute under which the petitioner was indicted and convicted.

Under what theory, the views of the majority Court in *Schmidt* vs. *United States* can be sustained in holding that, by implication, Congress intended the provisions of Section 5429 to apply to Section 5395, it is difficult to appreciate.

It is a well settled canon of statutory construction that the re-enactment of a Statute, leaving out a part of the former Act, amounts to a repeal of all not so re-enacted.

Sutherland on Statutory Construction, sec. 154.

It must be remembered that, when the provisions of the Act of July 14, 1870, were carried into the Revised Statutes, they were not merely reproduced as sections of the Revised Statutes. The provisions of the Act of July 14, 1870, were completely overhauled by the Revision Commissioners; they were revised, amended and enlarged, and, as so revised, amended and enlarged, were carried into the Revised Statutes and placed in different Chapters of the criminal statutes of the United States.

Congress evidently, *ex industria,* had evolved a different scheme and plan of denouncing offenses against the naturalization laws from that first contained in the Act of July 14, 1870.

In not making the omnibus provisions of Section 5429 of the Revised Statutes applicable to Section 5395 of the Revised Statutes, it undoubtedly had in mind the well settled rule of criminal law, that, "the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the *Government in whose tribunals that proceeding is had.*"

In re Loney, supra.

For that reason, obviously, if for no other, it placed Section 1 of the Act of July 14, 1870, as revised and amended, in the Chapter which deals with "Crimes against Justice," and numbered it Section 5395, and it placed the other Sections of the Act of July 14, 1870, in a different and subsequent Chapter entitled, "Crimes

against the Operation of the Government," and revised, amended and enlarged the scope of those Sections very much.

The conclusion is irresistible that Congress acted advisedly and wisely in limiting its jurisdiction over violations of naturalization laws committed in State Courts to those offenses denounced by Sections 5424-5428, and did not also include Section 5395, which refers solely to perjury or a false oath.

The rule of criminal law that perjury is properly punishable only by the jurisdiction where it is committed is an old and well established one.

Mr. Justice Parker so held in *State* vs. *Pike*, 15 N. H. 33; (4 N. H. 83).

See also *ex parte Bridges*, 2 Woods, 428; s. c. sub. nom. *Brown* vs. *United States*, 14 Amer. L. Reg. N. S. 566;

State vs. *Shelley*, 11 Lea. (Tenn.) 594;
Ross vs. *State*, 55 Ga., 192;
State vs. *Adams*, 4 Black, 146;
People vs. *Kelly*, 38 Cal. 145 (1869);
State vs. *Kirkpatrick*, 32 Kansas, 117;
See also *Rump* vs. *Commonwealth*, 30 Pa. 475;
State vs. *Whittemore*, 50 N. H. 245;
Spratt vs. *Spratt*, 4 Peters, 393, *408*; 7 L. Ed. 897.

These last three cases are explained by the U. S. Supreme Court *in re Loney*, 134 U .S. 372; 33 L. Ed. 949, *951.*

The case of *United States* vs. *Severino*, 125 Fed. Rep., 949, contains a very interesting discussion of the entire subject.

The learned Judge in that case held that: "Under Const. Art. 3, Sec. 1, providing that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may ordain and establish, * * * State Courts acting in the naturalization ol aliens pursuant to the authority given by Congress *remain State tribunals*, and do not become in any degree courts of the United States; and hence a perjury committed in such proceedings is an offense *against the State*, and not the federal sovereignty, and, in the absence of Statute conferring jurisdiction on the federal courts, *is exclusively a matter of State cognizance.*" (From syllabus of opinion.)

The learned Judge then considers the provisions of the Act of July 14, 1870, and their subsequent reproduction, as revised, amended and enlarged, in the Revised Statutes, and comes to the conclusion that there is a federal statute giving the Federal Courts jurisdiction over perjuries and false oaths committed in naturalization proceedings in State Courts, and that this federal statute is Section 5429 of the Revised Statutes, which, *by impli-*

cation and inference, so the learned Judge holds, refers to Section 5395 of the Revised Statutes, the Section under which the petitioner was indicted and convicted.

But, we respectfully submit that the learned Judge, in *United States* vs. *Severino*, fell into the same error as did the majority Court in the case of *Schmidt* vs. *United States*, (133 Fed. Rep. 257). Judge Thomas starts with the wrong principle, as did the majority Judges in the case of *Schmidt* vs. *United States*. The true and safe rule is that *no* act is punishable in a Federal Court, unless plainly made so by a law of Congress. Nevertheless, both Judge Thomas, in *United States* vs. *Severino*, and the majority Court, in *Schmidt* vs. *United States*, were compelled to resort to implication and inference in order to make the provisions of Section 5429 of the Revised Statutes applicable to Section 5395 thereof. This is not permitted in the interpretation of criminal Statutes. To repeat the sapient language of the United States Supreme Court, in *Todd* vs. *United States, supra*: "It is axiomatic that Statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under a Statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the Statutes.' " (Citing authorities.)

In concluding our argument on this first branch of the question of jurisdiction, we maintain that there was

no Federal Statute in existence, at the time the petitioner was charged and convicted in the Federal Court of the offense of testifying falsely in a naturalization proceeding in the State Court, which, in plain and unmistakable terms, conferred jurisdiction upon the Federal Courts to punish perjuries and false oaths committed in naturalization procedings in State Courts.

But assuming, for the sake of argument, that there be, by implication, such a Federal Statute, we contend that it woud be unconstitutional and void.

The power of Congress in the establishment of Courts, under the provisions of the Constitution of the United States, Art. 3, Sec. 1, is circumscribed.

The power is limited to the establishment of one Supreme Court and such inferior Courts as it may see fit to ordain and establish. In pursuance with this grant of power, Congress has ordained and established United States Circuit and District Courts, and subsequently United States Circuit Courts of Appeals.

Manifestly, Congress has no right to establish State Courts or, what would amount to the same thing, to endow State Courts with jurisdiction. The Constitution never contemplated such a condition of affairs.

But, where Congress has exclusive legislation over

certain subjects, it may limit the jurisdiction of State Courts, or take it away entirely.

See the observations of Judge Thomas in *United States* vs. *Severino, supra*:

> Also, *Ex parte Knowles*, 5 Cal. 300;
> *State* vs. *Whitman*, 50 N. H. 345; 9 Am. R. 196;
> *Rump* vs. *Commonwealth*, 33 Pa. 475;
> *In re Loney*, 134 U. S. 372; 33 L. Ed. 949.

It being clear that Congress cannot endow State Courts with any jurisdiction whatsoever, we next enquire: Where, then, does the State Court of California get its jurisdiction to naturalize aliens?

That answer plainly is: From the Constitution and laws of the State of California.

"A Court is a creature of the Constitution and laws under which it exists. To exercise any power not derived from such Constitution and laws, would necessarily be a usurpation."

Ex parte Knowles, 5 Cal. 300, *302*;

Section 5 of Art. VI of the Constitution of California (adopted in 1879) in defining the jurisdiction of "Superior Courts" provides, among other things: "And said Court shall have the power of naturalization, and to issue papers therefor."

Section 76 of the Code of Civil Procedure of the State of California, defining the original jurisdiction of Superior Courts of the State of California, provides in Subdivision 5 thereof: "Said Courts shall have the power of Naturalization, and to issue papers therefor."

The petitioner testified falsely, as to which he was charged and convicted, in the Superior Court of the State of California, in and for the City and County of San Francisco. For this offense, he was not indicted or tried and convicted in the State Courts, whose sovereignty he offended, but he was indicted, tried and convicted in a Federal Court.

Clearly, the naturalization proceeding in the Superior Court of the State of California was not conducted under the laws of Congress. The State Court acquired its jurisdiction solely from the Constitution and laws of the State. The acts of Congress as to naturalization could not invest the State Courts with jurisdiction. At the very most, the acts of Congress as to naturalization could only operate as limitations on the exercise of the jurisdiction of all State Courts throughout the United States, in the interest of uniformity. See Sec. 1, Art. VIII, Constitution of the United States.

In *Ex parte Frank Knowles, supra,* Associate Justice Heydenfeldt, delivering the opinion of the Supreme Court of the State of California, said: "Two propositions which have been made by the Counsel opposed to

the applicant, should first be disposed. These are: First —that the power to naturalize by virtue of the Act of Congress of 1802, is a judicial one; and Second—that Congress has no power to confer jurisdiction upon the Courts of a State. *Upon both of these propositions we affirmatively concur.* It is a judicial power; because upon evidence a conclusion has to be attained, resulting from the exercise of the judgment of the Court. This is simple and clear enough, without resorting to authority. But nevertheless, we refer to the case of *Spratt* v. *Spratt*, 4 Peters, 406, where it is distinctly so settled by Chief Justice Marshall.

"Congress has no power to confer jurisdiction upon the Courts of a State: because, First, the Constitution gives it no such power; and, Secondly, the Constitution expressly declares that" "the judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." See Sec. 1, Art. III, Const. U. S.

"The Constitution having thus fixed where the judicial power shall be vested, it cannot be vested elsewhere.

"There have been various adjudications maintaining this view, which it will be sufficient simply to cite.

"See *Martin* v. *Hunter's Lessee*, I Wheaton, 304. *The State of Maryland* v. *Thomas Butler*, reported in 12

Niles' Register, p. 115; *United States* v. *Lathrop,* 17 Johnson R., 4.; *State* v. *McBride,* Rice R. 400.

"It was urged in the course of the argument, and some authorities were cited, to the effect, that although Congress could not confer jurisdiction on a State so as to compel its exercise, yet it would be legitimate if the Court was willing to accept it. This is to me a solecism. A Court is a creature of the Constitution and laws under which it exists. To exercise any power not derived from such Constitution and laws, would necessarily be a usurpation. It sounds curious to say, "Congres shas no authority to give this power to the Court, yet the Court exercises this power by virtue of the authority of Congress."

While Congress cannot confer jurisdiction to naturalize on State Courts, still, as previously stated, it can, in naturalization proceedings, limit the State Court in its mode of proceeding, and can prohibit the State Courts from acting, and it actually has done so as to any State Court which is not a "Court of Record" and does not have "common law jurisdiction, and a Seal and Clerk."

Ex parte Frank Knowles, supra;
State vs. *Whitman, supra;*
Rump vs. *Commonwealth, supra;*
In re Loney, supra;

Bishop, in his Commentaries on Criminal law, (Vol. 2,

Sec. 866,) says: "State tribunals cannot punish breaches of the United States laws, even though an Act of Congress undertake to give them the authority. Neither can perjury against the United States be punished in the States as an offense against the States."

This is well settled law, and the converse is equally true. Federal tribunals cannot punish breaches of the State laws in Federal Courts, such as perjury committed in the State Courts.

See *People* vs. *Kelly*, 38 Cal., 145, and cases there cited.

To recapitulate our contentions on this branch of the argument, we maintain that, under Section 1, Art. 111 of the Constitution of the United States, judicial power cannot be conferred by Congress on State Courts; that "the proceeding for naturalization" is "a judicial proceeding in a Court of the State," and therefore such proceedings in a State Court are not "under such laws"—that is, under the laws of Congress—nor is the affidavit made or oath taken, "under or by virtue of" such laws, but the proceedings are under, and the oaths and affidavits made and taken by virtue of, the constitution and laws of the State of California, the laws of Congress being only limitations as to the form of proceeding for the purposes of securing uniformity.

Therefore, it follows from what has been said that any

perjury or false oaths committed in naturalization proceedings in State Courts are offenses solely against the sovereignty of the State of California, and not of the United States, and are punishable only by the State Court whose sovereignty has been offended and not by the United States Courts, and that any Act of Congress providing otherwise is unconstitutional and void.

If we are correct in our contentions as to either branch of the question of jurisdiction, it follows that the demurrer should have been sustained, and the motion in arrest of judgment granted.

II.

MISCONDUCT.

Fundamental Error—Indictment Given to Jury.

It is contended, on behalf of the petitioner, that the trial court and its officials and the jury committed misconduct to the substantial prejudice of the petitioner.

Assignments of error numbers 28 to 33, inclusive, and particularly assignments numbers 28 and 33, set forth the nature of the misconduct.

It is complained:

> "That the said District Court committed manifest error in permitting the jury upon retiring to deliberate on a verdict, to take with them, and keep during all their deliberation in the jury room, the indictment in the case, upon the back of which was

endorsed the verdict of guilty of another jury upon a previous trial had on the third count of said indictment." (Transcript of Record, p. 24.

Assignment number 33 is substantially the same. (Transcript of Record, p. 24.)

The bill of exceptions shows that the alleged misconduct occurred as follows:

"Thereupon and before the jury retired to deliberate upon their verdict the clerk of the court handed to the jury the forms of ballot with the indictment in the case. That said indictment was taken by them to the jury room and retained by them during their entire deliberations in the cause. That the jury retired at 12:30 o'clock and later returned to the court with a verdict of guilty on the third count of said indictment. That at the time said indictment was handed to the jury by the officials of the court and was taken by said jury to the jury room, there were the following indorsements upon said indictment:

" 'Form No. 168. Back of cover of indictment with plea and judgment. Arraigned Nov. 2, 1905. Mch. 14, 1906. Pleads not guilty. Tried April 5, 6, 7, 1906. Verdict not guilty on the 1st and 2nd Counts of the Indictment and *Guilty* on the 3d count of the Indictment. April 13, 1906. New

Trial granted.'" (Transcript of Record, p. 76.)

It is contended that this action of the trial court, and of its officials, and of the jury, was misconducted greatly prejudicial to the substantial rights of the petitioner, and, in effect, deprived him of a fair and impartial trial.

A motion for a new trial was made on this, among other, grounds, and a showing made by affidavits that the misconduct did not occur through the laches or neglect of the petitioner's counsel (Transcript of Record, pp. 81-82); and that the objectionable and highly prejudicial matter on the back of the indictment was actually read by the jurors (Transcript of Record, p. 83); and the showing was further supplemented by the affidavit of one juror (Charles C. Carpenter), who swore:

> "That it appeared from one of the endorsements on said indictment that the defendant had previously been found guilty of the same charge upon which he was being tried by the jury of which your deponent was a member. That the fact appearing on said indictment created an unfavorable opinion against said defendant in the mind of your deponent." (Transcript of Record, pp. 83-84.)

This motion for a new trial, made, as stated, at the second trial, was denied. (Transcript of Record, p. 81.)

It is an elementary rule of criminal jurisprudence that where a defendant is granted a new trial, he is clothed, upon the retrial, with the same constitutional guarantees of a fair and impartial trial, presumption of innocence, proof of guilt beyond all reasonable doubt, etc. In the eyes of the law, a defendant enters upon a retrial the same as if he had never been tried before.

> "The effect of granting a new trial in a criminal case is to put the case in the same position in which it was before any trial had taken place. * * * *No presumption of guilt arises from the former conviction,* and it must not be alluded to in the argument." (Vol. 14, Ency. Pl. & Pr., p. 972, and cases there cited.)

Such being the well-established doctrine, it was clearly improper and, we respectfully submit, reversible error for the trial court to permit the jury, on the retrial, to take with them to the jury room the indictment in the case, endorsed on the back of which was the fact that the petitioner had previously been found guilty of the same identical charge upon which he was being tried. It affirmatively appears from the affidavit of one juror that the fact that the petitioner had been found guilty by a previous jury on the very same charge upon which he was being tried, created an "unfavorable opinion" against the petitioner in the mind of the juror. That this fact of a previous conviction was known to all of the jurors also affirmatively appears from the affi-

davits, as the entire indictment with all of the endorsements were read by the jury. That this fact of a previous conviction must necessarily have greatly prejudiced the petitioner in the opinion of the members of the jury can not seriously be denied. That the petitioner was thereby denied that "free and impartial trial," which the supreme law of the land guarantees to every one accused of crime, must be conceded. The petitioner was entitled to be tried and his guilt or innocence established by the evidence presented at the retrial, and to permit, whether by inadvertence or otherwise, the jury to receive any information as to what transpired, at a previous trial, inimical to the petitioner, is certainly error. Particularly so, when the information is contained on such a solemn document as the indictment, and the jury is permitted to take the indictment to the jury room and peruse it to their hearts' content.

It would be manifestly improper for the prosecuting attorney, in his argument to the jury, to advert to the fact that the petitioner had previously been convicted of the same charge on which he was then being tried. Such conduct on the part of the prosecuting attorney would be reversible error.

It would, clearly, be gross error for the Court, in its charge to the jury, to comment on the fact that the petitioner had previously been convicted of the identical charge on which he was then being tried.

If the prosecuting attorney or the Court can not refer to the previous conviction of the petitioner on the same charge upon which he is being tried, why is it not equally gross and reversible error for the Court to permit a document to be taken to the jury room and perused by the jurors, showing a previous conviction of the petitioner on the same charge upon which he is being tried? That the substantial right of a defendant to a fair and impartial trial is seriously impaired, whether the information—that the defendant had been previously convicted of the same charge upon which he is being tried—be contained in the argument of the prosecuting attorney or in the remarks of the Court or on the back of the indictment which the Court permits the jury to take to the jury room and which they actually peruse, is too plain for argument.

In the case of *Ogden* vs. *United States,* 112 Fed. R. 523, it is held that it was misconduct on the part of the Court to give to the jury indictments, containing information of the adverse result of a previous trial, and that it would be *presumed* that prejudice had been generated by such misconduct. In the case at bar, we show that prejudice was actually caused. (See affidavit of Charles C. Carpenter, Transcript of Record, p. 83.)

The case of *Ogden* vs. *United States* is squarely in point. It was decided by the Circuit Court of Appeals for the Third Circuit. The Court there said:

"Another question is presented to us by the record, and that is whether the affidavits in support of the reasons for a new trial, *being uncontradicted*, do not make it incumbent upon this Court, not only to reverse the judgment of the Court below, with directions that the motion for a new trial be received and considered by the Court, *but that we should here direct a new trial to be granted.* The affidavits show that both indictments were handed to the jury by an officer of the Court, and taken into the jury room with other papers for their consideration, and that on the back of each indictment was the endorsement of the finding of the jury in the former trial, as set out in the record, that the defendant was guilty. There can be no question that the fact of the conviction on the indictments in the former trial could not have been put in evidence before the jury in the subsequent trial, and the Court so expressly ruled. It would have been improper to have mentioned the fact to the jury, in argument or otherwise. It was the right of the defendant below that his case should be submitted to the jury free from the influence naturally produced by the fact of a former conviction upon the same indictments, and on presumably the same testimony. The effect of bringing the fact of such former conviction prominently and authoritatively to the attention of the jurors could not but be prejudicial to the defendant below.

"It is, however, contended by the counsel for the defendant in error that it is not shown by the depositions taken that the endorsements on the indictments were read by any of the jurors. The fact that papers with such endorsements upon them were handed to the foreman of the jury, presumably by authority, along with other papers, by an officer of the Court, could hardly fail to give to the jury the impression that they were intended for their consideration, and that they were expected to have some weight in forming their verdict. We do not think it was necessary on the part of the defendant below to show that such endorsements had been read by the jurors or any of them. *It was a gross violation of the rights of the defendant below that they should have been handed to them at all in the manner in which they were. Trial by jury is properly surrounded by every reasonable safeguard, to insure the absence of any improper influence that might operate upon the minds of the jurors, and give to their verdict the dignity and respect so important to be maintained in the interests of an impartial administration of justice.* It was not necessary, therefore, in our opinion, that the defendant below should have gone further than he did, *when he showed the presence in the jury room of the indictments with the obnoxious endorsements, and the circumstances under which they came into the possession of the jury.* Whether

proof that these endorsements were not read by any of the jury would have brought us to a different conclusion need not now be considered. If it would have had such an effect, the burden was upon the defendant in error to produce the proof. *The presumption that their presence in the jury room, under the circumstances, was injurious to the defendant below, remains until rebutted by evidence on the part of the plaintiff below.*

"We could rest this view of the matter upon the exceeding importance of guarding every approach by which improper influence may reach the jury room, and it would much diminish the efficiency of these safeguards if we were to require the aggrieved party to a suit, to not only show that obnoxious and prohibited documents or other evidence were in the posession of the jury, but that the jurors had actually availed themselves of the opportunity thus presented to them by reading or discussing the same. An auxiliary reason for the view we have thus stated is that it is not open, to one seeking to set aside the verdict of a jury, to use jurors themselves as witnesses to disparage their own verdict. While the proof of the fact that a document was not only in the possession of the jury, but was read by them, when considered abstractly, may not transgress the line of separation between what a juror may and may not testify to, it would be very hard in practice to so guard the

testimony as to the fact of reading from trespassing upon the forbidden ground of the effect of the reading on the making up of the verdict.

"What we take to be the correct rule in this regard is not without support in decided cases, and none have been cited to us by the defendant in error clearly in conflict therewith. (*Dana* vs. *Tucker*, 4 Johns, 487; *Cluggage's Lessee* vs. *Swan*, 4 Bin. 150, 5 Am. Dec. 400; *Stull vs. Stull*, 197 Pa. 243, 47 Atl. 240; *La Bonty* vs. *Lundgren*, 41 Neb. 312, 59 N. W. 904; *State* vs. *Synder*, 20 Kan. 306; *People* vs. *Knapp*, 42 Mich. 267, 3 N. W. 927; *Moss* vs. *Com.*, 107 Pa. 267; *Meyer* vs. *Cadwalder*, [C. C.] 49 Fed. 32.)"

"We think, therefore, for the reasons stated, that the judgment of the Court below should be reversed, with directions that a new trial be granted."

This authority, we respectfully submit, is persuasive of the law applicable to the case at bar. The reason for the doctrine there enunciated rests on the soundest principles.

In that case, as in the case at bar, the showing made from affidavits, of the alleged misconduct, *was uncontradicted.* The United States Attorney, in the case at bar, did not attempt to impeach or contravene a single statement of facts contained in the affidavits filed, showing misconduct.

In that case, as in the case at bar, the question is presented "by the record." (*Ogden* vs. *U. S.*, p. 525.) It does not appear, from the opinion of the Circuit Court of Appeals in the case of *Ogden* vs. *U. S.*, *supra*, that any objection or exception had been taken or entered at the time the alleged misconduct occurred, to wit: at the time the indictment was, with the sanction of the Court, handed by an official of the Court to the jury and taken by the latter to the jury room and there perused by them.

In the case at bar, no objecton was made at the time and, in fact, not until the motion for a new trial was made. The affidavit of the attorney for the petitioner (Transcript of Record, p. 82) shows why no objection was made at the time, and, in fact, establishes that *no objection could be made, as the attorney was not aware that the Clerk of the Court was handing to the jury, with the approval of the Court, the indictment in the case.* The practice of handing the indictment to the jury is not one fixed by law, or by rule of Court, or even by custom.

The Circuit Court of Appeals, in the case of *Ogden* vs. *United States*, *supra*, passed upon the alleged misconduct from the facts set forth *in the record.* This is precisely the situation in the case at bar. While the refusal of the trial Court to grant a motion for a new trial may not be reversible error, still if, *from the entire record*, this appellate tribunal can see that manifest in-

justice has been done the petitioner—that his constitutional right to a fair and impartial trial has been substantially infringed upon—it will be swift to remedy the error, plainly appearing *in the record* and now complained of, although no objection was made at the time. If, as was said in the case of *Ogden* vs. *United States, supra,* "it was *a gross violation of the rights of the de-*"*fendant* below that they (the indictments) should "have been handed to them at all in the manner in "which they were," this appellate court will be quick to correct the injustice done to the petitioner, even though, through inadvertence or otherwise, no objection and exception were entered at the time.

The Court of Appeals, from which this petition for a writ of certiorari was prosecuted, declined to coincide with the reasoning of the Third Appellate Circuit as expressed in the case of *Ogden* vs. *United States.*

It declined to do so for the following two reasons: In the first place, it considered that portion of the opinion in the case of *Ogden* vs. *United States* which holds that "it was a gross violation of the rights of the de-"fendant below that they (the indictments) should "have been handed to them (the jury) at all in the "manner in which they were," as *obiter dictum;* and in the second place, it held that the fact that counsel for petitioner in the case at bar made no objection at the time the indictment was permitted by the trial Court to be given to the jury and taken by them to the jury

room, was fatal to the consideration of the question on appeal.

A reading of the case of *Ogden* vs. *United States* will disclose that that portion of the opinion was not *obiter dictum,* but, on the contrary, that the Court in that case *expressly decided* and *reversed* the case on the ground that the indictment should never have been handed to the jury. The conclusion of the Court, after elaborately considering this phase of the case, was "that the judgment of the Court below should be re-"versed, with directions *that a new trial be granted.*" This last clause is conclusive of the fact that the Ogden case was decided on the ground that permitting the jury to have the indictment was "a gross violation of "the rights of the defendant." Otherwise, that Court of Appeals would never have directed that a new trial be granted. It would simply have sent the case back to the trial Court with instructions to consider the motion for a new trial.

It is true that there were two questions involved. The first was, that the lower Court committed reversible error in refusing to entertain a motion for a new trial and in declining to permit affidavits to be filed showing that the indictments were handed to the jury and kept by them during their deliberations, and the second question, *upon which the case was expressly and actually decided,* was that "it "was a *gross violation* of the rights of defendant below

"that they (the indictments) should have been handed "to them at all in the manner in which they were."

The syllabus of the case is misleading, and would make it appear that the Court of Appeals for the Third Circuit decided the case on the first ground only, but such is not the fact, as a careful reading of the opinion will show. Had the Court of Appeals for the Third Circuit decided the case on the first ground alone it would not have wasted several pages of further discussion on the second ground; *nor would it have directed a new trial to be granted.* It would simply have directed the trial Court (as aptly expressed by it in its opinion on page 526), "that the motion for a new trial "be received and *considered by the Court.*" That is all it could have done, for it is well settled that the matter of granting or refusing a new trial is purely one of discretion with the trial Court. But the Court of Appeals for the Third Circuit went further than merely to direct the Court below "that the motion for a new "trial *be received and considered by the Court.*" It specifically and positively directed that a new trial be granted, and it ordered a new trial to be granted on the ground that "it was a gross violation of the rights of the "defendant that they (the indictments) should have "been handed to them at all in the manner in which "they were."

Here is the language of the Court of Appeals for the Third Circuit in the Ogden case which indubitably es-

tablishes that it decided, reversed and granted a new trial because of the gross violation of the rights of the defendant in giving to the jury an indictment which contained the information of the adverse result of a previous trial. Say the Court:

> "Another question is presented to us *by the record,* and that is whether the affidavits in support of the reasons for a new trial, being uncontradicted, do not make it *incumbent* on this Court, not only to reverse the judgment of the Court below, with directions that the motion for a new trial *be received and considered,* BUT THAT WE SHOULD HEREIN DIRECT A NEW TRIAL TO BE GRANTED."

Then the Court of Appeals for the Third Circuit proceeds seriously and elaborately to consider that phase of the case relating to the giving of the indictment to the jury and after more than one-half of the opinion is spent on that phase of the case, it decides and directs that *"a new trial should be granted,"* showing clearly that it placed its decision on the ground of the indictment having been given to the jury; otherwise it would simply have directed, as it properly states in its opinion on page 526, "that the motion for a new trial *"be received and considered* by the Court."

We deem that no further answer is needed to thoroughly refute the view taken by the Circuit Court

of Appeals for the Ninth Circuit in this case that the remarks of the Court of Appeals for the Third Circuit in the case of *Ogden* vs. *United States are obiter dictam* and therefore should not be followed.

As to the second point held by the Circuit Court of Appeals for the Ninth Circuit in this case, that the question was foreclosed because no objection was made, there are two replies: First, the prejudice created by sending an indictment to a jury upon which is recorded the adverse result of a previous trial is a *substantial prejudice,* and the *error* a *fundamental one.* It goes to the very essence of the constitutional right of a defendant to a fair and impartial trial, and if the record discloses this violation of a defendant's fundamental rights, the absence of an objection and exception seasonably taken cannot deprive a defendant of his substantial right to that fair and impartial trial.

In this case, the error appears on the face of the record.

The rule is well and compendiously stated as follows:

> "An exception to the general rule that an appellate court will not consider objections first raised on appeal—exists in the case of errors apparent on the face of the record; these may be considered by the Court, though not objected to below."

Cyc., vol. 2, p. 678, and cases there cited;
See, also, 2 Cent. Dig., title "Appeal and Error," secs. 1145 *et seq;*
Fuller vs. *Ferguson,* 26 Cal. 546;
Bennett vs. *Butterworth,* 11 How. 669, 13 L. Ed. 859;
Garland vs. *Davis,* 4 How. 131, 11 L. Ed. 907;
Kentucky L. Ins. Co. vs. *Hamilton,* 63 Fed. R. 93, 22 U. S. App. 586, *548,* 11 C. C. A. 42.

"But where error appears in the record proper, the appellate or reviewing court may correct it notwithstanding that no exception was taken thereto."

Cyc., vol. 2, p. 715, and cases there cited:
2 Cent. Dig., title "Appeal and Error," sec. 1147;
Macker vs. *Thomas,* 7 Wh. 530, L. Ed. 515.

The alleged misconduct appears in the record proper —in the bill of exceptions. (See Transcript of Record, pp. 155-156, 166-170.)

When, from the whole case, manifest injustice has been done, the appellate court will remedy the error, notwithstanding that no objection was made.

Ringgold vs. *Haven,* 1 Cal. 108.

When the whole record is brought up, the Court may

reverse upon a defect not noticed below, *and even upon its own notice of one not pointed out* by counsel.

Garland vs. *Davis*, 4 How. 131, *143*, 11 L. Ed. 907.

If error is apparent upon any part of the record, it is open to review, whether it is found in the *bill of exceptions or elsewhere.*

Suydam vs. *Williamson*, 20 How. 427, 15 L. Ed. 978.

The appellate court will notice a plain error in the record, even though there be no assignment of error.

United States vs. Pena et al., 175 U. S. 500, 44 L. Ed. 251;

Stevenson vs. *Barbour*, 140 U. S. 48, 35 L. Ed. 338;

Rowe vs. *Phelps*, 152, U. S. 87, 38 L. Ed. 365.

No presumption can be made in favor of the judgment of a lower court where error is apparent in the record.

United States vs. *Wilkinson*, 12 How. 246, 13 L. Ed. 974;

Reynolds vs. *United States*, 98 U. S. 145, 25 L. Ed. 244.

The error appearing, as it does, on the face of the record, and being a most substantial one, involving the sacred and constitutional right of the petitioner to a fair and impartial trial, should have been considered by the Circuit Court of Appeals, even though no objection was made at the time or until after it was ascertained that the mischief had been done.

Moreover, counsel for petitioner could not make an objection, because he was honestly and innocently deceived, as disclosed by his affidavit. (Transcript of Record, p. 82.) This affidavit was not contradicted by the United States Attorney. The Circuit Court of Appeals for the Ninth Circuit apparently ignored this affidavit. Had counsel for the petitioner been guilty of laches or inexcusable neglect the situation might be different, but he was in fact deceived, and laboring under such misapprehension, made no objection. Under the circumstances, the lack of an objection should not be held fatal to the petitioner's superior constitutional right to a fair and impartial trial, which he certainly did not have with evidence before the jury of the adverse result of a previous trial on the identical charge upon which he was being tried. If, as was said by the Circuit Court of Appeals for the Third Circuit in the Ogden case, " it was a *gross violation* of the rights of the "defendant below that they (the indictments) should "have been handed to them at all in the manner in

"which they were," then no failure of his counsel to object, whether excusable or not, could militate against the petitioner or waive his substantial and constitutional right to a fair and impartial trial.

As was well said in the case of *Ogden* vs. *United States;*

> "The effect of bringing the fact of such former conviction prominently and authoritatively to the attention of the jurors would not but be prejudicial to the defendant below. * * * The presumption that their presence in the jury-room, under the circumstances, was injurious to the defendant below, remains until rebutted by evidence on the part of the plaintiff below."

And Mr. Chief Justice Fuller, in the case of *Mattox* vs. *United States,* 143 U. S. 140, 36 L. Ed. 917, uses the following language, which is so apposite to this case:

> "It is vital * * * that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. *Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated."*

Besides what the record itself discloses on pages 76 and 77 of the Transcript of Record as to the miscon-

duct of the court, its officials and the jury, we supplemented the showing disclosed in the record by introducing the affidavits of jurors on the motion for a new trial. (See Transcript of Record, pp. 83-84.)

The practice of presenting affidavits by jurors, to show misconduct, is perfectly proper and does not come within the rule forbidding jurors from impeaching their verdict.

> *State* vs. *Parker,* 65 Pac. Rep. p. 776, and cases there cited.

In the above case, it was distinctly held that the affidavit of a juror may set forth the facts upon which he based his verdict, and that it is for the Court to deduce from these facts whether or not such misconduct occurred as to prejudice the substantial rights of a defendant.

Affidavits of jurors will be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself.

> *Wilson* vs. *People,* 4 Park. Crim. Rep. 619, *632.*
> *Nelms* vs. *State,* 13 Smedes & M. 500, *508;*
> Thomp. & M. Juries, secs. 262, *364, 448;*
> *Taylor* vs. *Everett,* 2 How. Pr. 32;
> *Thomas* vs. *Chapman,* 45 Barb. 98;

Gottlieb vs. *Jasper*, 27 Kan. 776;
U. S. vs. *Reid*, 12 How. 361, 13 L. Ed. 1023;
Farrar vs. *State*, 2 Ohio St. 54.

In the case of *Mattox* vs. *United States*, 143 U. S. 140, 36 L. Ed. 917, it was held that, on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible either to support or to impeach the verdict; *but a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence.*

In the case of *United States* vs. *Reid*, 12 How. 361, *366*, 13 L. Ed. 1023, *1025*, Mr. Chief Justice Taney, in speaking of the question whether the affidavits of jurors impeaching their verdict ought to be received, said:

> "It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. *But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice.*"

Mr. Justice Brewer, in the case of *Perry* vs. *Bailey*, 12 Kan. 539, *545* (12 Kan. 415; *419*, 2nd ed.), (Supreme Court of Kansas), clearly and succinctly states the true rule of demarcation between what may and

what may not be established by the affidavits of jurors to set aside a verdict, as follows:

> "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony. It gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to induce bad faith on the part of a minority; to induce an apparent acquiescense with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. *But as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One can not disturb the action of the twelve. It is useless to tamper with one, for the eleven may be heard. Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict—an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.*"

The affidavits offered in the case at bar were, under the authorities above referred to, admissible for the purpose of showing "extraneous influences" operating upon the minds of the jurors, or an "overt act, open to the knowledge of all the jury," which was deeply pre-

judicial to the substantiatial right of the petitioner to a fair and impartial trial.

We cannot refrain from quoting the language of the Court of Criminal Appeals of Texas in *Martin* vs. *State,* 36 S. W. Rep. 587:

> "The defendant in this case may be ever so guilty, but the meanest criminal in the land has an inalienable right to have his case passed upon by the jury under the known rules of evidence, *and to deny him this right is to deprive him of a fair and impartial trial according to the laws of the land.*"

We respectfully submit that from the facts, *appearing on the record,* there was misconduct so prejudicial to the petitioner as to entitle him to a reversal and a new trial.

III.

ACCOMPLICE.

The Trial Court Erred in Failing to Warn the Jury of the Danger in convicting a Defendant on the Testimony of an Accomplice.

This matter is the subject of assignment of error number 23. (Transcript of Record, pp. 22-76-79.) It is con-

tended that the trial Court erred in failing to give the instruction set out in said assignment of error, and in failing to give any advice to the jury as to the weight and credence to be accorded the testimony of an accomplice and in failing to warn the jury of the danger in convicting a defendant on the testimony of an accomplice.

The requested instruction, which the trial Court refused to give, is as follows:

> "I charge you that if you believe the testimony of the witness Frank Werta, then that said witness was an accomplice in crime with the defendant's aid. I instruct you that before you can convict said defendant the testimony of the witness Frank Werta should be corroborated by the testimony of at least one witness, or strong corroborative circumstances."

The common law rule, which prevails in the Federal Courts, is that a defendant may be convicted upon the uncorroborated testimony of an accomplice. But the practice of the courts, where such doctrine obtains, is to warn the jury of the danger of convicting unless the accomplice be strongly corroborated. The general rule is well stated in Greenleaf on Evidence (6th ed.), vol. 1, p. 493, as follows:

> "Sec. 380. The degree of credit which ought to

be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But, there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an *omission of duty* upon the part of the judge."

No common law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if his evidence satisfies the jury [illegible] guilt of the accused beyond a reasonable doubt. Hence, although the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the court *should* and *usually does* instruct them to that effect, they may, in the absence of a statutory provision to the contrary, convict upon the evidence of an accomplice alone, although uncorroborated.

Cyc., vol. 12, p. 453;
United States vs. *Ybanez,* 53 Fed. Rep. 536;
United States vs. *Flemming,* 18 Fed. Rep. 907;
United States vs. *Harries,* 26 Fed. Cas. No. 15309, 2 Bond. R. 311;
United States vs. *Smith,* 27 Fed. Cas. No. 16322, 2 Bond. R. 323;
United States vs. *McKee,* 26 *Fed. Cas. No.* 15685, 3 Dill. R. 546;
United States vs. *Lancaster,* 26 Fed. Cas. No. 15556, 2 McLean R. 431;
United States vs. *Reeves,* 38 Fed. Rep. 404;
United States vs. *Van Leuven,* 65 Fed. Rep. 78;
United States vs. *Sykes,* 58 Fed. Rep. 1004;
United States vs. *Kessler,* Bald. R. 22;
United States vs. *Sacia,* 2 Fed. Rep. 708;
People vs. *Bonney,* 98 Cal. 278.

See, also, sec. 1111, Penal Code California.

The trial court not only declined to instruct the jury in the language requested by counsel for petitioner, but failed to give any instructions at all to the jury advising them to be cautious in convicting upon such testimony, and as to what weight should be accorded such evidence. In these respects, we respectfully maintain the learned Judge of the trial Court was in error, and the Circuit Court of Appeals should have so held.

Although an accomplice is a competent witness for the prosecution, his testimony should be received with *great care and caution.*

United States vs. *Smith,* Fed. Cas. No. 16322;
United States vs. *Babcock,* Fed. Cas. No. 14487;
United States vs. *Goldberg,* Fed. Cas. No. 15223;
United States vs. *McKee,* Fed. Cas. No. 15686.

Except in one State, it seems to be the well-established and almost universal practice for the court to instruct that the testimony of an accomplice should be viewed by the jury with *great care and caution.*

See cases cited in Blashfield on Inst. to Juries, p. 485.

And a refusal to so instruct is ground for reversal.

Solander vs. *People,* 2 Colo. 48;
Cheatham vs. *State,* 67 Miss. 335;
People vs. *Sternberg,* 111 Cal. 11;
People vs. *Strybe,* 36 Pac. Rep. 3;
People vs. *Bonney,* 98 Cal. 278.

A conviction founded on the uncorroborated testimony of an accomplice is legal, although it is *almost universal practice, sanctioned by long usage and deliberate judicial approval,* to instruct juries to be *cautious* in convicting upon such testimony.

United States vs. *Neverson,* 1 Mackey, 152;

United States vs. *Bicksler,* 1 Mackey, 341;
State vs. *Hyer,* 39 N. J. Law;
State vs. *Honey,* 19 N. C. 390;
State vs. *Miller,* 97 N. C. 484.

In *United States* vs. *Sykes,* 58 Fed. Rep. 1000, *1004,* Judge Dick, in charging the jury, said:

> "The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury, and they may believe and act upon such evidence without any confirmation of his statements. But it is the *duty* of the judge to advise the jury to consider such testimony with *great caution,* and not to regard it as worthy of credit *without* corroboration by other evidence material to the issues before them. In doing so, the judge does not withdraw the case from the jury by positive direction, but only advises them not to give credit to such unsupported testimony."

In *Hanley et al.* vs. *United States,* 123 Fed. Rep. 849, it was held that a defendant in a criminal case in the Federal Courts can not complain because the testimony of an accomplice was submitted to the jury, *under instructions that it should be received with caution and carefully scrutinized.*

There is a total want of such instructions in the case at bar.

In *United States* vs. *Ybanez*, 53 Fed. Rep. 536, *540*, Judge Maxey said:

> "An accomplice 'is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense.'
>
> "It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has the right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an accomplice is, however, *always to be received with caution, and weighed and scrutinized with great care by the jury;* and it is *usual* for the courts to instruct juries —and you are so instructed in this case—*not* to regard the evidence of an accomplice *unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony.*"

While, technically, the learned Judge of the trial court may have been correct in refusing to give an instruction in the precise language requested by counsel for petitioner, nevertheless, the duty rested upon him

to give to the jury some appropriate instructions, telling them (to use the language of Judge Maxey) that the testimony of an accomplice is "always to be received with caution, and weighed and scrutinized with great care by the jury." The jury was left in total ignorance as to how they should weigh and consider the testimony of the accomplice, Frank Werta.

Where the *record* shows that the jury was improperly instructed, a new trial should be granted.

Cyc., vol. 2, p. 716, and cases there cited.

In *United States* vs. *Van Leuven,* 65 Fed. Rep. 78, *81,* District Judge Shiras said:

> "At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the state of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commis-

sion of the crime. *I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury* THAT THEY CANNOT CONVICT UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE."

The petitioner in the case at bar is a citizen of the State of California, and there is a statute in the State of California similar to that enacted in the State of Iowa.

See section 1111 of the Penal Code of California.

We respectfully submit that the remarks and the course invariably pursued by District Judge Shiras are peculiarly applicable to, and should have been followed in, this case by the trial court.

There is a statute in Texas similar to section 1111 of the Penal Code of California, and in the case of *Martin* vs. *State*, 36 S. W. 587, the Court of Criminal Appeals of Texas, in reversing a case for the failure of the trial court to charge that a conviction cannot be had on the uncorroborated testimony of accomplices, said, after quoting the statute of that State as to accomplices: "By "a long line of decisions, it has been held that, where "the state in a criminal prosecution introduces evidence "of accomplices, it is incumbent on the court to give in "charge to the jury the above article, and then, in all "proper cases, to define who are accomplices, or what

"it takes to constitute persons accomplices in the com-
"mission of crime. *This charge should be given,*
"*whether asked or not;* but it is especially incumbent
"on the court, when the matter is pointed out by a bill
"of exceptions, to give the law on accomplice's testi-
"mony in charge to the jury. (Citing many cases.)
"It is not necessary to discuss the testimony of said wit-
"nesses. The evidence not only tends to show that said
"three witnesses were accomplices, and that their testi-
"mony was materially prejudicial to the defendant, but
"the record establishes that the State's case is mainly
"based on their evidence; *and why the learned judge*
"*should have omitted, in a case of this importance, to*
"*give to the jury a charge on accomplice's testimony,*
"*especially when an exception was taken to his charge*
"*in this regard, is to us inexplicable.*"

Applying the case of *Martin* vs. *State* to the case at bar, and under the rule laid down by District Judge Shiras in *United States* vs. *Van Leuven, supra,* a new trial should have been directed by the trial court, and the Circuit Court of Appeals in this case should have so held.

The Circuit Court of Appeals for the Ninth Circuit did not find any fault with the law as above stated, but held that it did not apply to the case at bar for the reason that they did not consider that the prosecuting witness, one Werta, was an accomplice of the defendant (the petitioner in this Court).

We respectfully maintain that the prosecuting witness Werta was an accomplice of the petitioner. Werta wanted to become a citizen of the United States. He required the testimony of two witnesses. One of these was the petitioner Holmgren. Unless he had *procured* the assistance of the petitioner Holmgren as one of his witnesses or at the very least *allowed* him to appear as his witness, he never would have been adjudged a naturalized citizen. He aided and abetted the commission of the perjury committed by the petitioner Holmgren. Unless he had desired to become a citizen, the petitioner Holmgren would never have gone to court and committed the alleged perjury. In other words, it required the concurrence or participation of Werta to enable the petitioner Holmgren to commit the alleged perjury. Without the testimony of the petitioner Holmgren the court would never have admitted Werta as a citizen. Werta *knew* that the petitioner Holmgren was committing perjury in his behalf, and *assisted* by his *very presence* in the *courtroom.*

In perjury, all persons having a knowledge of the falsity of the statements and aiding in the crime are accomplices.

Cyc., vol. 12, p. 446, and cases there collated;
Smith vs. *State,* 37 Tex. Cr. 488, 36 S. W. 586;
Anderson vs. *State,* 20 Tex. App. 438;
Blakely vs. *State,* 24 Tex. App. 616, 7 S. W. 233, 5 Am. State Rep. 912;
State vs. *Scott,* 28 Or. 331.

Smith vs. *State, supra,* is directly in point. In that case it appeared, in a prosecution for false swearing as to the age of a girl to secure a marriage license, that shortly before the defendant made affidavit as to the age of the girl she had done so herself and had sworn falsely, and that she was aware that such affidavit was necessary to secure the license.

It was held that the girl was an accomplice of the defendant, so as to require her testimony to be corroborated to authorize a conviction.

The Court of Criminal Appeals of Texas said: "Under the facts narrated we are of opinion that Mattie "Liles was an accomplice. She made an affidavit at "the same time, or within a few minutes of the time, "that defendant made his affidavit that she was 18 years "of age. She ran away with the defendant for the purpose of obtaining a marriage license. * * * She "knew the defendant was going to make the affidavit "that she was 18 years of age before they reached "Weatherford, where the oath was taken. She went "with him for the purpose of being married, and knew, "or ought to have known, that a license would not be "issued under the circumstances, unless affidavit was "made that she was 18 years of age. *And under this "state of case we think she was an accomplice, and the "law applicable to accomplice's testimony should have "been given in the charge to the jury.*"

This authority might well be paraphrased and made to fit the case at bar, as follows: "Werta, the applicant "for citizenship, (the prosecuting witness), swore "in open court at the same time, or within a few min- "utes of the time, that defendant Holmgren gave his "testimony, that he (Werta) had lived in the United "States for at least five years. The applicant for citi- "zenship, Werta, met at the State Court the defendant "Holmgren as one of his witnesses for the purpose of "obtaining a certificate and judgment of citizenship. "* * * He (Werta) knew the defendant was going "to swear that he (the defendant) had known him (the "applicant for citizenship) for more than five years "in the United States, whereas he had only known him "four years in the United States. He (Werta) went "into Court with the defendant for the purpose of get- "ting his certificate and judgment of naturalization, "and knew, or ought to have known, that a certificate of "citizenship would not be issued under the circum- "stances unless it was sworn that the defendant had "known the applicant for citizenship in the United "States for at least five years."

Thus paraphrased, it is seen how appositely the language and rationale of the Court of Criminal Appeals of Texas apply to the facts of the case at bar.

Even if it be assumed that Werta did not actively procure the petitioner Holmgren to commit perjury, yet it indubitably appears that he *consented* to Holmgren's

committing perjury, and that *he actively assisted* by *his presence* in court and by *vouching* for the petitioner Holmgren as *one* of his witnesses.

The Court of Appeals for the Ninth Circuit held that the prosecuting witness Werta was not an accomplice because it did not appear "that he *solicited* the plaintiff in error (petitioner Holmgren) to make oath concerning his residence in the United States, or *suggested* the facts which were sworn to or assisted him in or *incited* him to the commission of the offense." (Transcript of Record, p. 95.) But we respectfully submit that the only tests of an accomplice are not that he should *solicit* one to commit perjury, or should *suggest* the facts which were false, or should *incite* the defendant to commit the offense. It is enough if he knew of the perjury about to be committed, and did anything to bring about, or assist in, the perjury. Werta, the prosecuting witness, brought about the perjury claimed to have been committed by the petitioner Holmgren, by presenting him to the Court as one of his witnesses and using his perjured testimony to obtain his certificate of naturalization. And it must be remembered that the act of perjury was committed in Werta's presence in open Court, and with Werta's sanction and entire approval, and for his own benefit.

The prosecuting witness Werta was certainly a principal in the second degree. By his appearing before the court as an applicant for citizenship, he made it possible

and, in fact, aided and abetted the petitioner Holmgren to commit the alleged offense. When the petitioner testified in Werta's behalf, the latter knew, if he is to be believed at all, that what the petitioner said to the court was false; and yet he *played his part.* By his very silence at the time, he made it possible for the petitioner Holmgren to commit the alleged perjury in his behalf and for his benefit.

He wanted to become a citizen of this country. His *own oath* was incompetent, under the law, to prove his residence. He therefore required the testimony of two witnesses. One of these was the petitioner Holmgren. The latter supplied the necessary testimony as to Werta's residence, and *thereby* Werta was adjudged a citizen. Werta knew, if his testimony be true, that the testimony of his witness Holmgren was false, but he permitted him to testify falsely on his behalf and accepted the benefits gained by his testimony.

Werta actively assisted in Holmgren's alleged perjury by being present in Court as the applicant for naturalization; and, by holding out to the Court, and vouching for the credibility of, Holmgren as one of his witnesses as to his residence in the United States and as to his good character, etc., etc., he made it possible for Holmgren to commit the alleged perjury. Without Werta's *presence* in Court, without his *appeal* to the Court to be admitted as a citizen, without Werta's

holding out the petitioner Holmgren as one of his witnesses, and *vouching* for his witnesses' *integrity* and *veracity,* the petitioner Holmgren never would, *never could,* have committed the alleged perjury. It required the presence of the applicant for citizenship (Werta) in the courtroom, to enable the petitioner Holmgren, as Werta's witness, to commit the alleged perjury. Had not Werta been an applicant for citizenship; had he not, as such, requiring the testimony of the petitioner Holmgren; had he not gone to and been present in Court; had he not *vouched for* and consented and acquiesced to all that the petitioner Holmgren said *in open Court on his behalf* on the subject of his residence, etc., etc.,; had Werta, the applicant for citizenship, not done all of these things, the petitioner Holmgren would have never been able to have perpetrated the alleged offense of perjury.

In brief, it required the actual and active participation of Werta to enable the petitioner Holmgren to commit perjury on behalf of Werta.

At the very least, Werta was a principal in the second degree, because (1) he was *present;* (2) he *knew* of the *alleged perjury;* (3) he assisted by his *presence,* by his *conduct* in *Court,* by *vouching* for Holmgren as *one* of *his witnesses,* by accepting the *benefits* derived from his testimony as to *residence,* etc., and by *so testifying himself* as to make Holmgren's testimony *acceptable to the Court* and *substantiatory* of his own.

Under all these circumstances, Werta (the prosecuting witness) and Holmgren (the defendant) were accomplices in crime, for the alleged crime could never have been committed but for the concurrence or participation of both. As previously stated, Werta was a principal in the second degree. He was present and aided and abetted the fact to be committed in the several particulars pointed out.

A principal in the second degree is he who is present, aiding and abetting the fact to be committed.

Chitty on Crim. Law, vol. I, p. 225;
4 Bla. Com. 34;
Ency. of Pl. & Pr., vol. I. p. 60.

In the case of *Anderson* vs. *State*, 20 Tex. App. 312, the defendant was convicted of perjury in swearing to an affidavit as a teacher in a public school that he had taught school for a certain period, when he had not done so. It developed that certain school trustees knew of the falsity of this affidavit and in fact had made an arrangement with the defendant, to save the money allotted to their school district for teacher's salary, that the defendant, though not teaching for February (as to which he had made an affidavit that he had) should teach for the month of June ensuing.

It was held that the trustees were accomplices with the defendant, simply because they knew of the perjury

and participated to the extent of signing a check in his favor for the month of February.

Say the Court: "This connection of the trustees with "the transaction made each one of them a *particeps* "*criminis* to the extent, at least, that his testimony "against the defendant should be held and treated as "accomplice testimony, and subject to the rules provid- "ing the necessity for corroboration of the same. The "testimony of McCrimmon was most important in "showing in connection with the witness Whitman, who "was the only other witness, that defendant had not "taught school in February. * * * Now the rule "is that in all cases where an accomplice a *particeps* "*criminis* testifies in behalf of the state, or where the "evidence tends to show that one or more of the state's "witnesses are accomplices, the law in relation to such "testimony should be given in charge to the jury. (Cit- "ing authorities.) In the otherwise full and lucid "charge of the court in this case we fail to find any "instruction relative to the accomplice testimony, and "for this error of omission as to the law applicable to "the case, the judgment will be reversed and the cause "remanded for another trial."

This authority is also directly in point. The trustees were held to be accomplices because they knew the affidavit to be false.

In the case at bar the prosecuting witness Werta

knew, if he is to be believed at all, that the petitioner Holmgren was committing perjury to assist him (Werta) to become a citizen of the United States. If he did not actively procure Holmgren to testify falsely, he at least *permitted* and *allowed* Holmgren to testify falsely in his behalf and for his especial benefit, and held him out to the court as his witness and vouched for his integrity and veracity as a witness. He was certainly a *particeps criminis*. He knew of the perjury and assisted in it *as the applicant for citizenship*.

Persons who participate in forging an instrument are accomplices of the *one who utters it*.

Preston vs. *State*, 40 Tex. Cr. 72, 48 S. W. 581.

One who gives an officer a bribe to permit a breach of the law is an accomplice of the officer who is bribed, even where the statute makes bribery or an offer to bribe and the acceptance of a bribe distinct offenses.

People vs. *Bissert*, 72 N. Y. App. Div. 620, affirmed in 172 N. Y. 643, 65 N. E. 1120;
Ruffin vs. *State*, 36 Tex. Cr. 565, 38 S. W. 169;
People vs. *Winant*, 24 Misc. (N. Y.) 361, 53 N. Y. Suppl. 695.

Clearly, Werta, the prosecuting witness, was an accomplice, and while a conviction may be had in the Federal court on the uncorroborated testimony of an

accomplice, nevertheless the *duty* rested on the trial Court to instruct and warn the jury as to the weight and credence to be given the testimony of an accomplice, and the danger of convicting unless the testimony of the accomplice be strongly corroborated. A reading of Werta's testimony will show that he is an ignorant, illiterate man. His testimony is a mass of contradictions and plainly indicates his irresponsibility and unreliability. While it did not appear in the case that he had actually been promised immunity for his perjury in the naturalization proceedings by testifying against the petitioner Holmgren, it does appear that he had been arrested and subsequently detained as a witness for the United States and then secured his release on bonds. (Transcript of Record, pp. 39-40). He has never been prosecuted on any charge by the Government. The danger of testimony, emanating from such a man as Werta, being colored, warped, exaggerated, and far beyond the truth, to serve the interests of the witness in escaping punishment himself is obvious. The liability to intimidation from fear of prosecution, and the anxiety to secure one's own freedom, are strong incentives in the heart of a weak, irresponsible and ignorant person to pervert the truth. As was aptly said by District Judge Shiras, in charging the jury in the case of *United States* vs. *Van Leuven, supra:*

> "There is always present to the mind of that person (the accomplice) the belief or understanding that if he testifies on behalf of the government he

may be freed from prosecution, or escape punishment."

And yet it was upon this kind of testimony, and coming from such a witness, that the United States Attorney asked for a verdict of guilty, *without a word of caution from the Court as to the unreliability and grave danger of such evidence.* No other witness was called by the Government to show what the petitioner said to the court at the time of the naturalization proceedings.

The instruction, by the trial Court, to the effect that each assignment of perjury must be established by the prosecution by the testimony of two witnesses or by the testimony of one witness and corroborating circumstances was not tantamount to advising and warning the jury as to the weight and credence to be given the testimony of an accomplice. To tell the jury that the assignment of perjury—the fact, that the particular statements, *if said,* were really false—must be established by the testimony of two witnesses or one witness and corroborating circumstances, is one thing. To tell the jury that the testimony of an accomplice is to be viewed with *care and caution,* is quite another thing in law. Neither can be confounded with the other. Each has its separate wise function and useful scope in the criminal law. The former is directed and limited to the falsity of the particular statement charged to have been made; the latter is directed and confined to the degree of credibility to be accorded the testimony

of an accomplice. And if the Government seeks to show that a defendant made a certain statement claimed to be false, and it is so unfortunate as to be compelled to rely, for proof of the fact that the statement was actually made, upon an accomplice, and not a disinterested witness, it may do so, but the jury should be advised and warned about convicting on such testimony of an accomplice.

Being an accomplice, we respectfully submit that the trial Court should have given the jury some appropriate instructions as to the weight to be accorded the testimony of the accomplice Werta, and should have warned them of the danger of convicting on the testimony of an accomplice, "unless he is confirmed and "corroborated in some material parts of his evidence "connecting the defendant with the crime by unim- "peachable testimony."

(Language of Judge Maxey in *United States* vs. *Ybanez, supra.*)

IV.

Question Whether or Not Werta Was an Accomplice Should Have Been Submitted to the Jury.

The Circuit Court of Appeals for the Ninth Circuit held that Werta was not an accomplice of the petitioner Holmgren, and that therefore the refusal of the trial

court to give the requested instruction, or any instruction, bearing on the subject of accomplices, was not error.

We respectfully submit that it was not the province of the trial court or the Circuit Court of Appeals to pass upon the fact whether or not Werta was an accomplice. *That is always a question for the jury.* Where there is any evidence at all that could connect a witness with a crime, the question of his being an accomplice or not is one *entirely for the jury.* In a case like the one at bar, where all the circumstances and some of the testimony raise the question, it was manifestly improper for the trial court to refuse the instruction requested.

Bell vs. *State,* (Tex. Crim. App.), 47 S. W. 1010;
Rios vs. *State,* (Tex. Crim. App.), 48 S. W. 505;
People vs. *Bolanger,* 71 Cal. 17;
People vs. *Curlee,* 53 Cal. 604;
Hawkins vs. *State,* (Tex. Crim. App.), 47 S. W. 992.

In *People* vs. *Curlee, supra,* the Supreme Court of California said: "It was for the jury, however, to de-
" termine whether he was an actual accomplice from all
" his testimony and the other evidence before them."

In *Bell* vs. *State*, 39 Tex. Cr. 677, it was said:

"In every case where an accomplice testifies, the "judge should be careful not to assume in any manner "the truth of the accomplice's testimony, but leave the "truth of that, as well as all other evidence, *to be found* "*by the jury.*"

People vs. *Barker*, 114 Cal. 617;
People vs. *Compton*, 123 Cal. 403.

Werta, an alien, sought naturalization and was incompetent to prove his own residence. Holmgren, the petitioner, who was competent, is alleged to have made false oath and supplied the necessary testimony as to Werta's residence. Werta allowed him to testify and accepted the benefits gained thereby. He had guilty knowledge of the perjury about to be committed, for he admits having paid one of his witnesses, Frank Johnson, $44, to appear as his witness. (Transcript of Record, pp. 31-32.) He denies that he paid the petitioner Holmgren a cent, or that the petitioner Holmgren ever asked him for a cent of money. (Transcript of Record, pp. 32-33.) Those are the circumstances. Werta's credibility, as to whether he was an accomplice or not, was for the jury to decide. The entire question was raised for the jury by the government and should have been submitted to the jury.

V

THIRD COUNT OF INDICTMENT FATALLY DEFECTIVE.

This question is raised by the first assignment of error. (Transcript of Record, p. 18; See also demurrer, Transcript of Record, p. 11; See motion in arerst of judgment, Transcript of Record, p. 84;)

An inspection of the third count of the indictment, which was the only count upon which the petitioner was convicted, will disclose that there is no appropriate allegation that the petitioner, Gustav Holmgren, was ever sworn as a witness.

The indictment alleges:

"And the Grand Jurors aforesaid, on their oath aforesaid, do further present; That Gustav Holmgren, late of the Northerrn District of California, to procure the naturalization of the said *Frank Werta* in the said hearing of said application then and there pending as aforesaid, appeared in person and was then and there produced as a witness before said Superior Court to testify for and on behalf of the said *Frank Werta* in the said hearing of said application pending as aforesaid, concerning the qualifications of the said *Frank Werta* to be admitted to be a citizen of the United States and the said *Frank Werta* then and there by Thomas John Quinn, then and there a Deputy Clerk of said Superior Court, *was in due form of law sworn*, etc."

The allegation of the indictment is that *Frank Werta* was sworn as a witness. There is no sufficient allegation that *Gustav Holmgren* was sworn as a witness.

The fact that the oath was administered to Gustav Holmgren is a most material one, to constitute perjury, and must be distinctly and positively averred. We submit that the alelgations of the indictment in this connection are insufficient, and that the demurrer and, subsequently, the motion in arrest of judgment should have been sustained on this ground.

In the case of People vs. Cohen, 118 Cal. 74, *79*, Justice Van Fleet (since then appointed United States District Judge, Northern District of California), delivering the opinion of the Supreme Court of the State of California in a case involving a charge of perjury, said: "There is no such averment here except it be by mere inference or legal conclusion, and that is not sufficient. The fact being material, it must be directly averred to satisfy the rules of pleading, even in a civil action, and, a fortiori, in a criminal pleading.

"Every fact and circumstance necessarily stated in an indictment must be laid positively; that is, the indictment must directly affirm that the defendant did so and so, or that such a fact happened under such and such circumstances. It cannot be stated by way of recital that whereas, etc., or the like. (Citations.)

The want of a direct allegation of anything material in the description, substance, nature, or manner of the offense cannot be supplied by any intendment or implication whatever; and, therefore, in an indictment for murder the omission of the words 'Exmalitia praecogitata' is not supplied by the words 'felonice murdravit,' although the latter words imply them. (Citations.) So in an indictment for perjury it must appear that the defendant *was regularly sworn.* (*State* vs. *Divoll,* 44 N. H. 140, *142.* See, also, *People* vs. *Howard,* 111 Cal. 655, *658.*)"

It is essential to the crime of perjury that the person alleged to have committed the offense must have been first duly sworn, and an indictment for perjury is insufficient in not alleging directly, or by necessary inference, that the defendant was first duly sworn by the officer that he would "testify, depose, or certify truly."

People vs. *Simpson,* 133 Cal. 367.

On the subject, generally, as to the particularity to be observed in pleading a public offense, see,

U. S. vs. *Cruikshank,* 92 U. S. 542; 23 L. Ed. 588.

VI

TRIAL COURT ERRED IN ADMITTING IN EVIDENCE, OVER DEFENDANT'S OBJECTION AND EXCEPTION, THE INSTRUMENT MARKED "U. S. EXHIBIT NO. 2."

This is the basis of assignment of error No. 4. (See Transcript of Record, p. 19.)

The Transcript of Record, at pages 44-48, shows that the prosecution made a determined attempt to introduce in evidence "United States Exhibit No. 2," which purported to be a correct transcript of a certain "Affidavit of Witness" as the same appeared in Book "A," page 288, of the Acts of Naturalization of the Superior Court of the State of California, in and for the City and County of San Francisco. The trial Court at first sustained the objections made to the introduction of this document, but finally admitted it in evidence, over objection and exception subsequently recorded. (See Transcript of Record, pp. 46-48.)

A reading of the testimony discloses that this affidavit of witness is not the original document claimed to have been signed by the petitioner as a witness in the naturalization proceeding, but it is one made up from an old form, and the blanks were filled in by one of the Assistant United States Attorneys who prosecuted this

case, to the best of his memory. The document as thus made up was objectionable for two reasons. In the first place, it is so inaccurately reproduced that it does not refer to Frank Werta, the applicant for citizenship, at all. It reads: "I am well acquainted with 24 1-2 Perry St., an applicant to be made a citizen of the United States, and have known him seven years."

We respectfully submit that such a garbled and inaccurate document was not admissible for any purpose, whether considered as primary or secondary evidence.

In the second place, the perjury or false oath, with which the petitioner was charged and convicted in the third count of the indictment, was predicated upon the testimony delivered by the petitioner *orally in Court* as a witness in the naturalization proceeding, and was not based upon anything contained in any document or affidavit of witnesses.

The admission of this document entitled "Affidavit of Witness," under the circumstances as disclosed by the testimony in the case, could only serve to confuse and mislead the jury, and the objection to its admissibility should have been sustained.

On all of the grounds urged it is respectfully and

earnestly submitted the judgment of conviction should be reversed and the petitioner discharged.

MARSHALL B. WOODWORTH,

Attorney for Petitioner.

FILED
APR 18 190
JAMES H. McKE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1907.

No. [redacted] 132.

GUSTAV HOLMGREN,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT,

AND BRIEF IN SUPPORT THEREOF

WM. M. MADDEN,
Attorney for Petitioner.

Bloom Pub. Co. Print, 120 McAllister St., S. F.

SUPREME COURT

OF THE UNITED STATES.

GUSTAV HOLMGREN,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.
POINTS RELIED ON.

This petition for a writ of certiorari is based on four grounds:

First. A conflict of decision between the Circuit Court of Appeals for the Third Circuit and the Circuit Court of Appeals for the Ninth Circuit, from which latter Court this petition for a writ of certiorari is being prosecuted.

The Circuit Court of Appeals for the Third Circuit held in the case of *Ogden* vs. *United States,* 112 Fed. R. 523, that it was "a gross violation of the rights of the defendant" to give to the jury an indictment, containing information of the adverse result of a previous trial, and that it would be presumed that prejudice had been generated by such misconduct.

The Circuit Court of Appeals for the Ninth Circuit, in the case here presented, refused to coincide with the law as laid down by the Circuit Court of Appeals for the Third Circuit in the case of *Ogden* vs. *United States, supra.*

Second. On the question of jurisdiction, the Circuit Court of Appeals for the Ninth Circuit held in this case that the Federal Courts have jurisdiction of perjuries committed in the State Courts in naturalization proceedings. It so held on the strength of a prior decision rendered by it in the case of *Schmidt* vs. *United States,* 133 Fed. R. 266. In that case Hon. E. M. Ross, one of the members of the Court who sat in this case in the Circuit Court of Appeals, dissented and filed an elaborate opinion. Therefore, as to the question of jurisdiction, the authority relied upon to sustain the jurisdiction of the Court contains the dissent of one of its members. The decision not being unanimous prompts the petitioner to invoke the review of this Court on the all-important question of the jurisdiction of the United States District Court.

Third. The Circuit Court of Appeals for the Ninth Circuit held that the prosecuting witness, one Werta, who had obtained fraudulent papers of naturalization and one of whose witnesses was the petitioner, Holmgren, was not an accomplice in the perjury committed by Holmgren to assist Werta in getting his citizenship papers, and that, not being an accomplice, the District Court properly declined to give any instructions as to the weight which should be accorded to the testimony of an accomplice.

This is urged as a ground for the granting of the petition for a writ of certiorari.

Fourth. It is next claimed, as a reason for granting the issuance of a writ of certiorari, that the trial court should have submitted to the jury, with appropriate instructions, the question whether or not, as a matter of fact, the prosecuting witness Werta was an accomplice with the petitioner Holmgren, and it is contended that the Circuit Court of Appeals should have reversed the case on that ground, among others. The question of being an accomplice is one entirely for the jury.

STATEMENT OF THE CASE.

The petitioner was indicted in the United States District Court for a violation of Section 5395 of the Revised Statutes of the United States. The indictment contained three counts. He was charged in each of these counts with the offense of perjury in testifying as a witness in three separate naturalization proceedings. He had two trials. On the first trial, he was acquitted on counts one and two, and convicted on count three. (See Transcript of Record, p. 21.)

The perjury, with which he was charged and convicted on the third count, consisted in swearing that he had known in the United States the applicant for citizenship, one Frank Werta, for five years immediately prior to the application for citizenship, whereas, as alleged in the indictment, he had not known him for more than four years prior to said application. (Transcript of Record, p. 20.) He was granted a new trial

as to his conviction on the third count. (Transcript of Record, p. 21.) He was subsequently retried on the third count and convicted. A motion for a new trial was made and denied. (Transcript of Record, pp. 163-165.) A motion in arrest of judgment was likewise denied. (Transcript of Record, p. 170.)

ARGUMENT.

MISCONDUCT.

Fundamental Error—Indictment Given to Jury.

It is contended, on behalf of the petitioner, that the trial court and its officials and the jury committed misconduct to the substantial prejudice of the petitioner.

Assignments of error numbers 28 to 33, inclusive, and particularly assignments numbers 28 and 33, set forth the nature of the misconduct.

It is complained:

> "That the said District Court committed manifest error in permitting the jury upon retiring to deliberate on a verdict, to take with them, and keep during all their deliberation in the jury room, the indictment in the case, upon the back of which was endorsed the verdict of guilty of another jury upon a previous trial had on the third count of said indictment." (Transcript of Record, pp. 48-49.)

Assignment number 33 is substantially the same. (Transcript of Record, p. 50.)

The bill of exceptions shows that the alleged misconduct occurred as follows:

> "Thereupon and before the jury retired to delib-

erate upon their verdict the clerk of the court handed to the jury the forms of ballot with the indictment in the case. That said indictment was taken by them to the jury room and retained by them during their entire deliberations in the cause. That the jury retired at 12:30 o'clock and later returned to the court with a verdict of guilty on the third count of said indictment. That at the time said indictment was handed to the jury by the officials of the court and was taken by said jury to the jury room, there were the following indorsements upon said indictment:

"'Form No. 168. Back of cover of indictment with plea and judgment. Arraigned Nov. 2, 1905. Mch. 14, 1906. Pleads not guilty. Tried April 5-6-7, 1906. Verdict not guilty on the 1st and 2d Counts of the Indictment and *Guilty* on the 3d count of the Indictment. April 13, 1906. New Trial granted.'" (Transcript of Record, pp. 155-6.)

It is contended that this action of the trial court, and of its officials, and of the jury, was misconduct greatly prejudicial to the substantial rights of the defendant, and, in effect, deprived him of a fair and impartial trial.

A motion for a new trial was made on this, among other, grounds, and a showing made by affidavits that the misconduct did not occur through the laches or neglect of the defendant's counsel (Transcript of Record, pp. 166-167); and that the objectionable and highly prejudicial matter on the back of the indictment was actually read by the jurors (Transcript of Record, p.

168); and the showing was further supplemented by the affidavit of one juror (Charles C. Carpenter), who swore:

> "That it appeared from one of the endorsements on said indictment that the defendant had previously been found guilty of the same charge upon which he was being tried by the jury of which your deponent was a member. That the fact appearing on said indictment created an unfavorable opinion against said defendant in the mind of your deponent." (Transcript of Record, pp. 169-170.)

This motion for a new trial, made, as stated, at the second trial, was denied. (Transcript of Record, p. 165.)

It is an elementary rule of criminal jurisprudence that where a defendant is granted a new trial, he is clothed, upon the retrial, with the same constitutional guarantees of a fair and impartial trial, presumption of innocence, proof of guilt beyond all reasonable doubt, etc. In the eyes of the law, a defendant enters upon a retrial the same as if he had never been tried before.

> "The effect of granting a new trial in a criminal case is to put the case in the same position in which it was before any trial had taken place. * * * No presumption of guilt arises from the former conviction, and it must not be alluded to in the argument." (Vol. 14, Ency. Pl. & Pr., p. 972, and cases there cited.)

Such being the well-established doctrine, it was clearly improper and, we respectfully submit, reversible error for the trial court to permit the jury, on

the retrial, to take with them to the jury room the indictment in the case, endorsed on the back of which was the fact that the defendant had previously been found guilty of the same identical charge upon which he was being tried. It affirmatively appears from the affidavit of one juror that the fact that the defendant had been found guilty by a previous jury on the very same charge upon which he was being tried, created an "unfavorable opinion" against the defendant in the mind of the juror. That this fact of a previous conviction was known to all of the jurors also affirmatively appears from the affidavits, as the entire indictment with all of the endorsements were read by the jury. That this fact of a previous conviction must necessarily have greatly prejudiced the defendant in the opinion of the members of the jury can not seriously be denied. That the defendant was thereby denied that "free and impartial trial," which the supreme law of the land guarantees to every one accused of crime, must be conceded. The defendant was entitled to be tried and his guilt or innocence established by the evidence presented at the retrial, and to permit, whether by inadvertence or otherwise, the jury to receive any information as to what transpired, inimical to the defendant, at a previous trial, is certainly error. Particularly so, when the information is contained on such a solemn document as the indictment, and the jury is permitted to take the indictment to the jury room and peruse it to their hearts' content.

It would be manifestly improper for the prosecuting attorney, in his argument to the jury, to advert to the

fact that the defendant had previously been convicted of the same charge on which he was then being tried. Such conduct on the part of the prosecuting attorney would be reversible error.

It would, clearly, be gross error for the Court, in its charge to the jury, to comment on the fact that the defendant had previously been convicted of the identical charge on which he was then being tried.

If the prosecuting attorney or the Court can not refer to the previous conviction of the defendant on the same charge upon which he is being tried, why is it not equally gross and reversible error for the Court to permit a document to be taken to the jury room and perused by the jurors, showing a previous conviction of the defendant on the same charge upon which he is being tried? That the substantial right of a defendant to a fair and impartial trial is seriously impaired, whether the information—that the defendant had been previously convicted of the same charge upon which he is being tried—be contained in the argument of the prosecuting attorney or in the remarks of the Court or on the back of the indictment which the Court permits the jury to take to the jury room and which they actually peruse, is too plain for argument.

In the case of *Ogden* vs. *United States,* 112 Fed. R. 523, it is held that it was misconduct on the part of the Court to give to the jury indictments, containing information of the adverse result of a previous trial, and that it would be *presumed* that prejudice had been generated by such misconduct. In the case at bar, we show

that prejudice was actually caused. (See affidavit of Charles C. Carpenter, Transcript of Record, p. 169.)

The case of *Ogden* vs. *United States* is squarely in point. It was decided by the Circuit Court of Appeals for the Third Circuit. The Court there said:

> "Another question is presented to us by the record, and that is whether the affidavits in support of the reasons for a new trial, ***being uncontradicted,*** do not make it incumbent upon this Court, not only to reverse the judgment of the Court below, with directions that the motion for a new trial be received and considered by the Court, ***but that we should here direct a new trial to be granted.*** The affidavits show that both indictments were handed to the jury by an officer of the Court, and taken into the jury room with other papers for their consideration, and that on the back of each indictment was the endorsement of the finding of the jury in the former trial, as set out in the record, that the defendant was guilty. There can be no question that the fact of the conviction on the indictments in the former trial could not have been put in evidence before the jury in the subsequent trial, and the Court so expressly ruled. It would have been improper to have mentioned the fact to the jury, in argument or otherwise. It was the right of the defendant below that his case should be submitted to the jury free from the influence naturally produced by the fact of a former conviction upon the same indictments, and on presumably the same testimony. The effect of bringing the fact of such former conviction prominently and authoritatively to the attention of the jurors could not but be prejudicial to the defendant below.

"It is, however, contended by the counsel for the defendant in error that it is not shown by the depositions taken that the endorsements on the indictments were read by any of the jurors. The fact that papers with such endorsements upon them were handed to the foreman of the jury, presumably by authority, along with other papers, by an officer of the Court, could hardly fail to give to the jury the impression that they were intended for their consideration, and that they were expected to have some weight in forming their verdict. We do not think it was necessary on the part of the defendant below to show that such endorsements had been read by the jurors or any of them. *It was a gross violation of the rights of the defendant below that they should have been handed to them at all in the manner in which they were. Trial by jury is properly surrounded by every reasonable safeguard, to insure the absence of any improper influence that might operate upon the minds of the jurors, and give to their verdict the dignity and respect so important to be maintained in the interests of an impartial administration of justice.* It was not necessary, therefore, in our opinion, that the defendant below should have gone further than he did, *when he showed the presence in the jury room of the indictments with the obnoxious endorsements, and the circumstances under which they came into the possession of the jury.* Whether proof that these endorsements were not read by any of the jury would have brought us to a different conclusion need not now be considered. If it would have had such an effect, the burden was upon the defendant in error to produce the proof.

The presumption that their presence in the jury room, under the circumstances, was injurious to the defendant below, remains until rebutted by evidence on the part of the plaintiff below.

"We could rest this view of the matter upon the exceeding importance of guarding every approach by which improper influence may reach the jury room, and it would much diminish the efficiency of these safeguards if we were to require the aggrieved party to a suit, to not only show that obnoxious and prohibited documents or other evidence were in the possession of the jury, but that the jurors had actually availed themselves of the opportunity thus presented to them by reading or discussing the same. An auxiliary reason for the view we have thus stated is that it is not open, to one seeking to set aside the verdict of a jury, to use jurors themselves as witnesses to disparage their own verdict. While the proof of the fact that a document was not only in the possession of the jury, but was read by them, when considered abstractly, may not transgress the line of separation between what a juror may and may not testify to, it would be very hard in practice to so guard the testimony as to the fact of reading from trespassing upon the forbidden ground of the effect of the reading on the making up of the verdict.

"What we take to be the correct rule in this regard is not without support in decided cases, and none have been cited to us by the defendant in error clearly in conflict therewith. (*Dana* vs. *Tucker*, 4 Johns, 487; *Cluggage's Lessee* vs. *Swan*, 4 Bin. 150, 5 Am. Dec. 400; *Stull* vs. *Stull*, 197 Pa. 243, 47 Atl. 240; *La Bonty* vs. *Lundgren*, 41

Neb. 312, 59 N. W. 904; *State* vs. *Snyder,* 20 Kan. 306; *People* vs. *Knapp,* 42 Mich. 267, 3 N. W. 927; *Moss* vs. *Com.,* 107 Pa. 267; *Meyer* vs. *Cadwalder,* [C. C.] 49 Fed. 32.)"

"We think, therefore, for the reasons stated, that the judgment of the Court below should be reversed, with directions that a new trial be granted."

This authority, we respectfully submit, is persuasive of the law applicable to the case at bar. The reason for the doctrine there enunciated rests on the soundest principles.

In that case, as in the case at bar, the showing made from affidavits, of the alleged misconduct, *was uncontradicted.* The United States Attorney, in the case at bar, did not attempt to impeach or contravene one statement of fact contained in the affidavits filed, showing misconduct.

In that case, as in the case at bar, the question is presented "by the record." (*Ogden* vs. *U. S.,* p. 525.) It does not appear, from the opinion of the Circuit Court of Appeals in the case of *Ogden* vs. *U. S., supra,* that any objection or exception had been taken or entered at the time the alleged misconduct occurred, to wit: at the time the indictment was, with the sanction of the Court, handed by an official of the Court to the jury and taken by the latter to the jury room and there perused by them. In the case at bar, no objection was made at the time and, in fact, not until the motion for a new trial was made. The affidavit of the attorney for the defendant (Transcript of Record, pp. 166-167) shows why no objection was made at the time, and, in

fact, establishes that *no objection could be made, as the attorney was not aware that the Clerk of the Court was handing to the jury, with the approval of the Court, the indictment in the case.* The practice of handing the indictment to the jury is not one fixed by law, or by rule of Court, or even by custom.

The Circuit Court of Appeals, in the case of *Ogden* vs. *United States, supra,* passed upon the alleged misconduct from the facts set forth *in the record.* This is precisely the situation in the case at bar. While the refusal of the trial Court to grant a motion for a new trial may not be reversible error, still if, *from the entire record,* this appellate tribunal can see that manifest injustice has been done the defendant—that his constitutional right to a fair and impartial trial has been substantially infringed upon—it will be swift to remedy the error, plainly appearing *in the record* and now complained of, although no objection was made at the time. If, as was said in the case of *Ogden* vs. *United States, supra,* "it was *a gross violation of the rights of the de-*" *fendant* below that they (the indictments) should " have been handed to them at all in the manner in " which they were," this appellate court will be quick to correct the injustice done to the defendant, even though, through inadvertence or otherwise, no objection and exception were entered at the time.

The Court of Appeals, from which this petition for a writ of certiorari is being prosecuted, declined to coincide with the reasoning of the Third Appellate Circuit as expressed in the case of *Ogden* vs. *United States.*

It declined to do so for the following two reasons: In the first place, it considered that portion of the opinion in the case of *Ogden* vs. *United States* which holds that "it was a gross violation of the rights of the de- " fendant below that they (the indictments) should " have been handed to them (the jury) at all in the " manner in which they were," as *obiter dictum;* and, in the second place, it held that the fact that counsel for defendant in the case at bar made no objection at the time the indictment was permitted by the trial Court to be given to the jury and taken by them to the jury room, was fatal to the consideration of the question on appeal.

A reading of the case of *Ogden* vs. *United States* will disclose that that portion of the opinion was not *obiter dictum,* but, on the contrary, that the Court in that case *expressly decided* and *reversed* the case on the ground that the indictment should never have been handed to the jury. The conclusion of the Court, after elaborately considering this phase of the case, was " that the judgment of the Court below should be re- " versed, with directions *that a new trial be granted.*" This last clause is conclusive of the fact that the Ogden case was decided on the ground that permitting the jury to have the indictment was "a gross violation of " the rights of the defendant." Otherwise, that Court of Appeals would never have directed that a new trial be granted. It would simply have sent the case back to the trial Court with instructions to consider the motion for a new trial.

It is true that there were two questions involved. The first was, that the lower Court committed reversible error in refusing to entertain a motion for a new trial and in declining to permit affidavits to be filed showing that the indictments were handed to the jury and kept by them during their deliberations, and the second question, *upon which the case was expressly and actually decided,* was that "it "was a *gross violation* of the rights of defendant below "that they (the indictments) should have been handed "to them at all in the manner in which they were."

The syllabus of the case is misleading, and would make it appear that the Court of Appeals for the Third Circuit decided the case on the first ground only, but such is not the fact, as a careful reading of the opinion will show. Had the Court of Appeals for the Third Circuit decided the case on the first ground alone it would not have wasted several pages of further discussion on the second ground; *nor would it have directed a new trial to be granted.* It would simply have directed the trial Court (as aptly expressed by it in its opinion on page 526), "that the motion for a new trial "be received and *considered by the Court.*" That is all it could have done, for it is well settled that the matter of granting or refusing a new trial is purely one of discretion with the trial Court. But the Court of Appeals for the Third Circuit went further than merely directing the Court below "that the motion for a new "trial *be received and considered by the Court.*" It specifically and positively directed that a new trial be

granted, and it ordered a new trial to be granted on the ground that "it was a gross violation of the rights of the " defendant that they (the indictments) should have " been handed to them at all in the manner in which " they were."

Here is the language of the Court of Appeals for the Third Circuit in the Ogden case which indubitably establishes that it decided, reversed and granted a new trial because of the gross violation of the rights of the defendant in giving to the jury an indictment which contained the information of the adverse result of a previous trial. Say the Court:

> "Another question is presented to us *by the record,* and that is whether the affidavits in support of the reasons for a new trial, being uncontradicted, do not make it *incumbent* on this Court, not only to reverse the judgment of the Court below, with directions that the motion for a new trial *be received and considered,* BUT THAT WE SHOULD HEREIN DIRECT A NEW TRIAL TO BE GRANTED."

Then the Court of Appeals for the Third Circuit proceeds seriously and elaborately to consider that phase of the case relating to the giving of the indictment to the jury and after more than one-half of the opinion is spent on that phase of the case, it decides and directs that *"a new trial should be granted,"* showing clearly that it placed its decision on the ground of the indictment having been given to the jury; otherwise it would simply have directed, as it properly states in its opinion on page 526, "that the motion for a new trial " *be received and considered* by the Court."

We deem that no further answer is needed to thoroughly refute the view taken by the Circuit Court of Appeals for the Ninth Circuit in this case that the remarks of the Court of Appeals for the Third Circuit in the case of *Ogden vs. United States* are *obiter dictum* and therefore should not be followed.

As to the second point held by the Circuit Court of Appeals for the Ninth Circuit in this case, that the question was foreclosed because no objection was made, there are two replies: First, the prejudice created by sending an indictment to a jury upon which is recorded the adverse result of a previous trial is a *substantial prejudice,* and the *error* a *fundamental one.* It goes to the very essence of the constitutional right of a defendant to a fair and impartial trial, and if the record discloses this fundamental violation of a defendant's rights, the absence of an objection and exception seasonably taken cannot deprive a defendant of his substantial right to that fair and impartial trial.

In this case, the error appears on the face of the record.

The rule is well and compendiously stated as follows:

> "An exception to the general rule that an appellate court will not consider objections first raised on appeal—exists in the case of errors apparent on the face of the record; these may be considered by the Court, though not objected to below."
>
> Cyc., vol. 2, p. 678, and cases there cited;
> See, also, 2 Cent. Dig., title "Appeal and Error," secs. 1145 *et seq;*

Fuller vs. *Ferguson,* 26 Cal. 546;
Bennett vs. *Butterworth,* 11 How. 669, 13 L. Ed. 859;
Garland vs. *Davis,* 4 How. 131, 11 L. Ed. 907;
Kentucky L. Ins. Co. vs. *Hamilton,* 63 Fed. R. 93, 22 U. S. App. 586, 548, 11 C. C. A. 42.

"But where error appears in the record proper, the appellate or reviewing court may correct it notwithstanding that no exception was taken thereto."

Cyc., vol. 2, p. 715, and cases there cited:
2 Cent. Dig., title "Appeal and Error," sec. 1147;
Macker vs. *Thomas,* 7 Wh. 530, L. Ed. 515.

The alleged misconduct appears in the record proper —in the bill of exceptions. (See Transcript of Record, pp. 155-156, 166-170.)

When, from the whole case, manifest injustice has been done, the appellate court will remedy the error, notwithstanding that no objection was made.

Ringgold vs. *Haven,* 1 Cal. 108.

When the whole record is brought up, the Court may reverse upon a defect not noticed below, *and even upon its own notice of one not pointed out* by counsel.

Garland vs. *Davis,* 4 How. 131, *143,* 11 L. Ed. 907.

If error is apparent upon any part of the record, it is open to review, whether it is found in the *bill of exceptions or elsewhere.*

Suydam vs. *Williamson,* 20 How. 427, 15 L. Ed. 978.

The appellate court will notice a plain error in the record, even though there be no assignment of error.

United States vs. *Pena et al.,* 175 U. S. 500, 44 L. Ed. 251;

Stevenson vs. *Barbour,* 140 U. S. 48, 35 L. Ed. 338;

Rowe vs. *Phelps,* 152 U. S. 87, 38 L. Ed. 365.

No presumption can be made in favor of the judgment of a lower court where error is apparent in the record.

United States vs. *Wilkinson,* 12 How. 246, 13 L. Ed. 974;

Reynolds vs. *United States,* 98 U. S. 145, 25 L. Ed. 244.

The error appearing, as it does, on the face of the record, and being a most substantial one, involving the sacred and constitutional right of the defendant to a fair and impartial trial, should have been considered by the Circuit Court of Appeals, even though no objection was made at the time or until after it was ascertained that the mischief had been done.

Moreover, counsel for defendant could not make an objection, because he was honestly and innocently deceived, as disclosed by his affidavit. (Transcript of Record, pp. 166-167.) This affidavit was not contradicted by the United States Attorney. The Circuit Court of Appeals for the Ninth Circuit apparently ignored this affidavit. Had counsel for the defendant been guilty of laches or inexcusable neglect the situation might be different,

but he was in fact deceived, and laboring under such misapprehension, made no objection. Under the circumstances, the lack of an objection should not be held fatal to the defendant's superior constitutional right to a fair and impartial trial, which he certainly did not have with evidence before the jury of the adverse result of a previous trial on the identical charge upon which he was being tried. If, as was said by the Circuit Court of Appeals for the Third Circuit in the Ogden case, "it was a *gross violation* of the rights of the "defendant below that they (the indictments) should "have been handed to them at all in the manner in "which they were," then no failure of his counsel to object, whether excusable or not, could militate against the defendant or waive his substantial and constitutional right to a fair and impartial trial.

As was well said in the case of *Ogden* vs. *United States:*

> "The effect of bringing the fact of such former conviction prominently and authoritatively to the attention of the jurors would not but be prejudicial to the defendant below. * * * The presumption that their presence in the jury-room, under the circumstances, was injurious to the defendant below, remains until rebutted by evidence on the part of the plaintiff below."

And Mr. Chief Justice Fuller, in the case of *Mattox* vs. *United States,* 143 U. S. 140, 36 L. Ed. 917, uses the following language, which is so apposite to this case:

> "It is vital * * * that the jury should pass upon the case free from external causes tending to

disturb the exercise of deliberate and unbiased judgment. *Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated."*

Besides what the record itself discloses on pages 155 and 156 of the Transcript of Record as to the misconduct of the court, its officials and of the jury, we supplemented the showing disclosed in the record by introducing the affidavits of jurors on the motion for a new trial. (See Transcript of Record, pp. 166-170.)

The practice of presenting affidavits by jurors, to show misconduct, is perfectly proper and does not come within the rule forbidding jurors from impeaching their verdict.

State vs. *Parker,* 65 Pac. Rep. p. 776, and cases there cited.

In the above case, it was distinctly held that the affidavit of a juror may set forth the facts upon which he based his verdict, and that it is for the Court to deduce from these facts whether or not such misconduct occurred as to prejudice the substantial rights of a defendant.

Affidavits of jurors will be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself.

Wilson vs. *People,* 4 Park. Crim. Rep. 619, *632;*

Nelms vs. *State,* 13 Smedes & M. 500, *508;*
Thomp. & M. Juries, secs. 262, *364, 448;*

Taylor vs. *Everett,* 2 How. Pr. 32;
Thomas vs. *Chapman,* 45 Barb. 98;
Gottlieb vs. *Jasper,* 27 Kan. 776;
U. S. vs. *Reid,* 12 How. 361, 13 L. Ed. 1023;
Farrar vs. *State,* 2 Ohio St. 54.

In the the case of *Mattox* vs. *United States,* 143 U. S. 140, 36 L. Ed. 917, it was held that, on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible either to support or to impeach the verdict; *but a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence.*

In the case of *United States* vs. *Reid,* 12 How. 361, *366,* 13 L. Ed. 1023, *1025,* Mr. Chief Justice Taney, in speaking of the question whether the affidavits of jurors impeaching their verdict ought to be received, said:

> "It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. *But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice."*

Mr. Justice Brewer, in the case of *Perry* vs. *Bailey,* 12 Kan. 539, *545* (12 Kan. 415, *419,* 2nd ed.), (Supreme Court of Kansas), clearly and succinctly states the true rule of demarcation between what may and what may not be established by the affidavits of jurors to set aside a verdict, as follows:

"Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony. It gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to induce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. *But as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One can not disturb the action of the twelve. It is useless to tamper with one, for the eleven may be heard. Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict—an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.*"

The affidavits offered in the case at bar were, under the authorities above referred to, admissible for the purpose of showing "extraneous influences" operating upon the minds of the jurors, or an "overt act, open to the knowledge of all the jury," which was deeply prejudicial to the substantial right of the defendant to a fair and impartial trial.

We cannot refrain from quoting the language of the Court of Criminal Appeals of Texas in *Martin* vs. *State*, 36 S. W. Rep. 587:

"The defendant in this case may be ever so

guilty, but the meanest criminal in the land has an inalienable right to have his case passed upon by the jury under the known rules of evidence, *and to deny him this right is to deprive him of a fair and impartial trial according to the laws of the land.*"

We respectfully submit that from the facts, *appearing on the record,* there was misconduct so prejudicial to the defendant as to entitle him to a reversal and a new trial, and that this application for a writ of certiorari should be granted on this ground alone.

II.

JURISDICTION.

Offense, if any, Committed in State Court. Has Federal Court Jurisdiction?

The Circuit Court of Appeals for the Ninth Circuit in this case gave no independent consideration to the question of jurisdiction, but simply referred to its previous decision of *Schmidt* vs. *United States,* 133 Fed. Rep. 257. In that case the question was elaborately and ably discussed. The majority of the Court held that jurisdiction would lie, while one member (Hon. E. M. Ross) dissented from the views of his associates and wrote a lengthy and, in our humble judgment, a most convincing opinion to the effect that the Federal Courts had no jurisdiction of the offense of perjury committed in the State Courts.

We can do no better than to make this dissenting ~~convincing opinion to the effect that the Federal Courts~~

opinion a part of our petition and brief for the writ of certiorari. The learned Judge stated his views as follows:

"Ross, Circuit Judge (dissenting). The plaintiff in error was indicted and prosecuted for, and convicted of, the crime of perjury, committed in the superior court of the state of Washington for Walla Walla county, in 10 certain naturalization proceedings then and there pending. One of the questions presented by the present appeal, and the first to be considered and disposed of, is in respect to the jurisdiction of the court below over the offense.

"The same question was before Judge Thomas, in the Southern District of New York, in the recent case of the *United States* v. *Severino,* (C. C.), 125 Fed. 949, and was by him quite fully considered, in an opinion in which the jurisdiction of the federal courts was sustained. He reached the conclusion, in which I quite agree—

" 'That state courts, while entertaining jurisdiction in naturalization proceedings, remain state courts, and that perjury committed by a witness in such a proceeding is punishable by the sovereignty whose justice it offends (that is, the state court), and that the federal court cannot entertain jurisdiction in the absence of a federal statute conferring it.'

"Judge Thomas, in the case cited, further held that section 5395 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3654) is applicable to perjuries committed in naturalization proceedings in the state courts, and therefore sustained the federal jurisdiction of such offenses.

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In considering that question, it was said by the learned judge:

"'At the first view there would be hesitation in concluding that Congress intended to punish perjuries in naturalization proceedings, committed in a court foreign to its governmental jurisdiction, against another and independent sovereignty, thereby making its penal statutes applicable to offenses committed against the justice of a separate state. But it is precisely what at a time, and for a time at least, it did do, in plainest terms, by Act July 14, 1870, c. 254, 16 Stat. 254 (U. S. Comp. St. 1901, p. 3654).'

"The first subdivision of section 2165, tit. 30, of the Revised Statutes (U. S. Comp. St. 1901, p. 1329), embodying the naturalization laws, is as follows:

"'An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise: First, he shall declare on oath, before a circuit or district court of the United States, or a district or a supreme court of the territories, or a court of record of any of the states having common law jurisdiction and a seal and clerk, two years at least prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.'

"By its Act of July 14, 1870, c. 254, 16 Stat. 254 (U. S. Comp. St. 1901, p. 3654), Congress amended those laws in certain particulars, and for

the first time made specific provision for the punishment of crimes committed against them: declaring, among other things, in its first section—

" 'That in all cases where any oath, affirmation, or affidavit shall be made or taken under or by virtue of any act or law relating to the naturalization of aliens, or in any proceedings under such acts or laws, and any person or persons taking or making such oath, affirmation, or affidavit, shall knowingly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof, shall upon conviction thereof to be sentenced to imprisonment for a term not exceeding five years and not less than one year, and to a fine not exceeding one thousand dollars;' and in its fourth section, 'that the provisions of this act shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceedings for naturalization shall be commenced, had, or taken, or attempted to be commenced; and the Courts of the United States shall have jurisdiction of all offenses under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed.'

"The provisions of the act of July 14, 1870, were subsequently revised, amended, and carried into the Revised Statutes as sections 5395, 5424, 5425, 5426, 5427, 5428, and 5429 (U. S. Comp. Ct. 1901, pp. 3654, 3668-3670), which reads as follows:

" 'Sec. 5395. In all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit who know-

ingly swears falsely, shall be punished by imprisonment not more than five years, nor less than one year, and by a fine of not more than one thousand dollars.'

" 'Sec. 5424. Every person applying to be admitted a citizen, or appearing as a witness for any such person, who knowingly personates any other person than himself, or falsely appears in the name of a deceased person, or in an assumed or fictitious name, or falsely makes, forges, or counterfeits any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or who utters, sells, disposes of, or uses as true or genuine, or for any unlawful purpose, any false, forged, ante-dated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or sells or disposes of to any person, other than the person for whom it was originally issued any certificate of citizenship, or certificate showing any person to be admitted a citizen, shall be punished by imprisonment at hard labor not less than one year, nor more that five years, or by a fine of not less than three hundred nor more than one thousand dollars, or by both such fine and imprisonment.'

" 'Sec. 5425. Every person who uses, or attempts to use, or aids, or assists, or participates in the use of any certificate of citizenship, knowing the same to be forged, or counterfeit, or ante-dated, or knowing the same to have been procured by fraud or otherwise unlawfully obtained; or who, without lawful excuse, knowingly is possessed of any

false, forged, ante-dated, or counterfeit certificate of citizenship, purporting to have been issued under the provisions of any law of the United States relating to naturalization, knowing such certificate to be false, forged, ante-dated, or counterfeit, with intent unlawfully to use the same; or obtains, accepts, or receives any certificate of citizenship known to such person to have been procured by fraud or by the use of any false name, or by means of any false statement made with intent to procure, or to aid in procuring, the issue of such certificate, or known to such person to be fraudulently altered or ante-dated; and every person who has been or may be admitted to be a citizen, who, on oath or by affidavit, knowingly denies that he has been so admitted, with intent to evade or avoid any duty or liability imposed or required by law, shall be imprisoned at hard labor not less than one year nor more than five years, or be fined not less than three hundred dollars nor more than one thousand dollars, or both such punishments may be imposed.'

" 'Sec. 5426. Every person who in any manner uses for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise, unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order or certificate, judgment, or exemplification has been unlawfully issued or made; and every person who unlawfully uses, or attempts to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be

punished by imprisonment at hard labor, not less than one year nor more than five years, or by a fine of not less than three hundred dollars nor more than one thousand dollars, or by both such fine and imprisonment.'

" 'Sec. 5427. Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made felony, or counsels, advises, or procures, or attempts to procure, the commission thereof, shall be punished in the same manner and to the same extent as the principal party.'

" 'Sec. 5428. Every person who knowingly uses any certificate of naturalization heretofore granted by any court or hereafter granted, which has been or may be procured by fraud or by false evidence, or has been or may be issued by the clerk, or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; and every person who falsely represents himself to be a citizen of the United States, without having been duly admitted to citizenship, for any fraudulent purpose whatever, shall be punishable by a fine of not more than one thousand dollars, or be imprisoned not more than two years, or both.'

" 'Sec. 5429. The provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced.'

"It will be observed that, in these revised and

amended sections, Congress was dealing specifically with crimes against the naturalization laws. By section 5429 it expressly made the provisions of sections 5424, 5425, 5426, 5427, and 5428 applicable to 'all proceedings had or taken, or attempted to be had or taken, before any court (federal or state) in which any proceeding for naturalization may be commenced or attempted to be commenced.' Thus having its attention specifically directed to the subject, Congress, in revising and amending the provisions of the act of July 14, 1879, omitted the provision of section 4, of that act conferring upon the courts of the United States 'jurisdiction of all offenses under the provisions of this act in or before whatsover court or tribunal the same shall have been committed,' and made applicable to naturalization proceedings had in the state courts only the provisions of sections 5424, 5425, 5426, and 5427 and 5428, which do not include the crime of perjury committed in such proceedings in a court of a state. That action of Congress was in accord with the rule declared by the Supreme Court in Loney's Case, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949, where it is said that 'the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had.'

"I am of the opinion that the court below was without jurisdiction of the alleged offense, for which reason I think the judgment should be reversed, with directions to that court to dismiss the indictment."

Without elaborating, we rely most confidently upon the correctness of the views expressed in the opinion of the learned Judge who dissented, and submit that, on so important a question as that of jurisdiction, the judgment of this tribunal of last resort should be had.

III.

ACCOMPLICE.

The Trial Court Erred in Failing to Warn the Jury of the Danger in Convicting a Defendant on the Testimony of an Accomplice.

This matter is the subject of assignment of error number 23. (Transcript of Record, pp. 46, 154.) It is contended that the trial Court erred in failing to give the instruction set out in said assignment of error, and in failing to give any advice to the jury as to the weight and credence to be accorded the testimony of an accomplice and in failing to warn the jury of the danger in convicting a defendant on the testimony of an accomplice.

The requested instruction, which the trial Court refused to give, is as follows:

> "I charge you that if you believe the testimony of the witness Frank Werta, then that said witness was an accomplice in crime with the defendant's aid. I instruct you that before you can convict said defendant the testimony of the witness Frank Werta should be corroborated by the testimony of at least one witness, or strong corroborative circumstances."

The common law rule, which prevails in the Federal Courts, is that a defendant may be convicted upon the uncorroborated testimony of an accomplice. But the practice of the courts, where such doctrine obtains, is to warn the jury of the danger of convicting unless the accomplice be strongly corroborated. The general rule is well stated in Greenleaf on Evidence (6th ed.), vol. 1, p. 493, as follows:

> "Sec. 380. The degree of credit which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But, there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an *omission of duty* upon the part of the judge."

No common law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if his evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Hence, although the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and

the court *should* and *usually does* instruct them to that effect, they may, in the absence of a statutory provision to the contrary, convict upon the evidence of an accomplice alone, although uncorroborated.

Cyc., vol. 12, p. 453;
United States vs. *Ybanez,* 53 Fed. Rep. 536;
United States vs. *Flemming,* 18 Fed. Rep. 907;
United States vs. *Harries,* 26 Fed. Cas. No. 15309, 2 Bond. R. 311;
United States vs. *Smith,* 27 Fed. Cas. No. 16322, 2 Bond. R. 323;
United States vs. *McKee,* 26 Fed. Cas. No. 15685, 3 Dill. R. 546;
United States vs. *Lancaster,* 26 Fed. Cas. No. 15556, 2 McLean R. 431;
United States vs. *Reeves,* 38 Fed. Rep. 404;
United States vs. *Van Leuven,* 65 Fed. Rep. 78;
United States vs. *Sykes,* 58 Fed. Rep. 1004;
United States vs. *Kessler,* Bald. R. 22;
United States vs. *Sacia,* 2 Fed. Rep. 708;
People vs. *Bonney,* 98 Cal. 278.

See, also, sec. 1111, Penal Code Cal.

The trial court not only declined to instruct the jury in the language requested by counsel for defendant, but failed to give any instructions at all to the jury advising them to be cautious in convicting upon such testimony, and as to what weight should be accorded such evidence. In these respects, we respectfully maintain the learned Judge of the trial Court was in error, and the Circuit Court of Appeals should have so held.

Although an accomplice is a competent witness for

the prosecution, his testimony should be received with *great care and caution.*

United States vs. *Smith,* Fed. Cas. No. 16322;
United States vs. *Babcock,* Fed. Cas. No. 14487;
United States vs. *Goldberg,* Fed. Cas. No. 15223;
United States vs. *McKee,* Fed. Cas. No. 15686.

Except in one State, it seems to be the well-established and almost universal practice for the court to instruct that the testimony of an accomplice should be viewed by the jury with *great care and caution.*

See cases cited in Blashfield on Inst. to Juries, p. 485.

And a refusal to so instruct is ground for reversal.

Solander vs. *People,* 2 Colo. 48;
Cheatham vs. *State,* 67 Miss. 335;
People vs. *Sternberg,* 111 Cal. 11;
People vs. *Strybe,* 36 Pac. Rep. 3;
People vs. *Bonney,* 98 Cal. 278.

A conviction founded on the uncorroborated testimony of an accomplice is legal, although it is *almost universal practice, sanctioned by long usage and deliberate judicial approval,* to instruct juries to be *cautious* in convicting upon such testimony.

United States vs. *Neverson,* 1 Mackey, 152;
United States vs. *Bicksler,* 1 Mackey, 341;
State vs. *Hyer,* 39 N. J. Law;
State vs. *Honey,* 19 N. C. 390;
State vs. *Miller,* 97 N. C. 484.

In *United States* vs. *Sykes,* 58 Fed. Rep. 1000, *1004,* Judge Dick, in charging the jury, said:

"The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury, and they may believe and act upon such evidence without any confirmation of his statements. But it is the *duty* of the judge to advise the jury to consider such testimony with *great caution,* and not to regard it as worthy of credit *without* corroboration by other evidence material to the issues before them. In doing so, the judge does not withdraw the case from the jury by positive direction, but only advises them not to give credit to such unsupported testimony."

In *Hanley et al.* vs. *United States,* 123 Fed. Rep. 849, it was held that a defendant in a criminal case in the Federal Courts can not complain because the testimony of an accomplice was submitted to the jury, *under instructions that it should be received with caution and carefully scrutinized.*

There is a total want of such instructions in the case at bar.

In *United States* vs. *Ybanez,* 53 Fed. Rep. 536, *540,* Judge Maxey said:

"An accomplice 'is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense.'

"It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has the right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to con-

sider it. The testimony of an accomplice is, however, *always to be received with caution, and weighed and scrutinized with great care by the jury;* and it is *usual* for the courts to instruct juries —and you are so instructed in this case—*not* to regard the evidence of an accomplice *unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony."*

While, technically, the learned Judge of the trial court may have been correct in refusing to give an instruction in the precise language requested by counsel for defendant, nevertheless, the duty rested upon him to give to the jury some appropriate instructions, telling them (to use the language of Judge Maxey) that the testimony of an accomplice is "always to be received with caution, and weighed and scrutinized with great care by the jury." The jury was left in total ignorance as to how they should weigh and consider the testimony of the accomplice, Frank Werta.

Where the *record* shows that the jury was improperly instructed, a new trial should be granted.

Cyc., vol. 2, p. 716, and cases there cited.

In *United States* vs. *Van Leuven,* 65 Fed. Rep. 78, *81*, District Judge Shiras said:

"At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise for a jury to convict a

person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the state of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the crime. *I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury* THAT THEY CANNOT CONVICT UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE."

The defendant in the case at bar is a citizen of the State of California, and there is a statute in the State of California similar to that enacted in the State of Iowa.

See section 1111 of the Penal Code of California.

We respectfully submit that the remarks and the course invariably pursued by District Judge Shiras are peculiarly applicable to, and should have been followed in, this case by the trial court.

There is a statute in Texas similar to section 1111 of the Penal Code of California, and in the case of *Martin* vs. *State,* 36 S. W. 587, the Court of Criminal Appeals of Texas, in reversing a case for the failure of the trial court to charge that a conviction cannot be had on the uncorroborated testimony of accomplices, said, after

quoting the statute of that State as to accomplices: "By " a long line of decisions, it has been held that, where " the state in a criminal prosecution introduces evidence " of accomplices, it is incumbent on the court to give in " charge to the jury the above article, and then, in all " proper cases, to define who are accomplices, or what " it takes to constitute persons accomplices in the com- " mission of crime. *This charge should be given,* " *whether asked or not;* but it is especially incumbent " on the court, when the matter is pointed out by a bill " of exceptions, to give the law on accomplice's testi- " mony in charge to the jury. (Citing many cases.) " It is not necessary to discuss the testimony of said wit- " nesses. The evidence not only tends to show that said " three witnesses were accomplices, and that their testi- " mony was materially prejudicial to the defendant, but " the record establishes that the State's case is mainly " based on their evidence; *and why the learned judge* " *should have omitted, in a case of this importance, to* " *give to the jury a charge on accomplice's testimony,* " *especially when an exception was taken to his charge* " *in this regard, is to us inexplicable.*"

Applying the case of *Martin* vs. *State* to the case at bar, and under the rule laid down by District Judge Shiras in *United States* vs. *Van Leuven, supra,* a new trial should have been directed by the trial court, and the Circuit Court of Appeals in this case should have so held.

The Circuit Court of Appeals for the Ninth Circuit did not find any fault with the law as above stated, but

held that it did not apply to the case at bar for the reason that they did not consider that the prosecuting witness, one Werta, was an accomplice of the defendant (the petitioner in this Court).

We respectfully maintain that the prosecuting witness Werta was an accomplice of the defendant. Werta wanted to become a citizen of the United States. He required the testimony of two witnesses. One of these was the defendant Holmgren. Unless he had *procured* the assistance of the defendant Holmgren as one of his witnesses or at the very least *allowed* him to appear as his witness, he never would have been adjudged a naturalized citizen. He aided and abetted the commission of the perjury committed by the defendant Holmgren. Unless he had desired to become a citizen, the defendant Holmgren would never have gone to court and committed the alleged perjury. In other words, it required the concurrence or participation of Werta to enable the defendant Holmgren to commit the alleged perjury. Without the testimony of the defendant Holmgren the court would never have admitted Werta as a citizen. Werta *knew* that the defendant Holmgren was committing perjury in his behalf; and *assisted* by his *very presence* in the *courtroom*.

In perjury, all persons having a knowledge of the falsity of the statements and aiding in the crime are accomplices.

Cyc., vol. 12, p. 446, and cases there collated;
Smith vs. *State,* 37 Tex. Cr. 488, 36 S. W. 586;
Anderson vs. *State,* 20 Tex. App. 438;

Blakely vs. *State,* 24 Tex. App. 616, 7 S. W. 233, 5 Am. State Rep. 912;
State vs. *Scott,* 28 Or. 331.

Smith vs. *State, supra,* is directly in point. In that case it appeared, in a prosecution for false swearing as to the age of a girl to secure a marriage license, that shortly before the defendant made affidavit as to the age of the girl she had done so herself and had sworn falsely, and that she was aware that such affidavit was necessary to secure the license.

It was held that the girl was an accomplice of the defendant, so as to require her testimony to be corroborated to authorize a conviction.

The Court of Criminal Appeals of Texas said: "Under the facts narrated we are of opinion that Mattie Liles was an accomplice. She made an affidavit at the same time, or within a few minutes of the time, that defendant made his affidavit that she was 18 years of age. She ran away with the defendant for the purpose of obtaining a marriage license. * * * She knew the defendant was going to make the affidavit that she was 18 years of age before they reached Weatherford, where the oath was taken. She went with him for the purpose of being married, and knew, or ought to have known, that a license would not be issued under the circumstances, unless affidavit was made that she was 18 years of age. *And under this state of case we think she was an accomplice, and the law applicable to accomplice's testimony should have been given in the charge to the jury.*"

This authority might well be paraphrased and made to fit the case at bar, as follows: "Werta, the applicant " for citizenship, (the prosecuting witness), swore " in open court at the same time, or within a few min- " utes of the time, that defendant Holmgren gave his " testimony, that he (Werta) had lived in the United " States for at least five years. The applicant for citi- " zenship, Werta, met at the State Court the defendant " Holmgren as one of his witnesses for the purpose of " obtaining a certificate and judgment of citizenship. " * * * He (Werta) knew the defendant was going " to swear that he (the defendant) had known him (the " applicant for citizenship) for more than five years " in the United States, whereas he had only known him " four years in the United States. He (Werta) went " into Court with the defendant for the purpose of get- " ting his certificate and judgment of naturalization, " and knew, or ought to have known, that a certificate of " citizenship would not be issued under the circum- " stances unless it was sworn that the defendant had " known the applicant for citizenship in the United " States for at least five years."

Thus paraphrased, it is seen how appositely the language and rationale of the Court of Criminal Appeals of Texas apply to the facts of the case at bar.

Even if it be assumed that Werta did not actively procure the defendant Holmgren to commit perjury, yet it indubitably appears that he *consented* to Holmgren's committing perjury, and that *he actively assisted* by *his presence* in court and by *vouching* for the defendant Holmgren as *one* of his witnesses.

The Court of Appeals for the Ninth Circuit held that the prosecuting witness Werta was not an accomplice because it did not appear "that he *solicited* the plaintiff in error (petitioner Holmgren) to make the oath concerning his residence in the United States, or *suggested* the facts which were sworn to or assisted him in or *incited* him to the commission of the offense." (Transcript of Record, p. 14 of Addenda.) But we respectfully submit that the only tests of an accomplice are not that he should *solicit* one to commit ~~crime~~ perjury, or should *suggest* the facts which were false, or should *incite* the defendant to commit the offense. It is enough if he knew of the perjury about to be committed, and did anything to bring about the perjury. Werta, the prosecuting witness, brought about the perjury claimed to have been committed by the defendant Holmgren, by presenting him to the Court as one of his witnesses and using his perjured testimony to obtain his certificate of naturalization. And it must be remembered that the act of perjury was committed in Werta's presence in open Court, and with Werta's sanction and entire approval, and for his own benefit.

The prosecuting witness Werta was certainly a principal in the second degree. By his appearing before the court as an applicant for citizenship, he made it possible and, in fact, aided and abetted the defendant Holmgren to commit the alleged offense. When the defendant testified in Werta's behalf, the latter knew, if he is to be believed at all, that what the defendant said to the court was false; and yet he *played his part.* By his very

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silence at the time, he made it possible for the defendant Holmgren to commit the alleged perjury in his behalf and for his benefit.

He wanted to become a citizen of this country. His *own oath* was incompetent, under the law, to prove his residence. He therefore required the testimony of two witnesses. One of these was the petitioner Holmgren. The latter supplied the necessary testimony as to Werta's residence, and *thereby* Werta was adjudged a citizen. Werta knew, if his testimony be true, that the testimony of his witness Holmgren was false, but he permitted him to testify falsely on his behalf and accepted the benefits gained by his testimony.

Werta actively assisted in Holmgren's alleged perjury by being present in Court as the applicant for naturalization; and, by holding out to the Court, and vouching for the credibility of, Holmgren as one of his witnesses as to his residence in the United States and as to his good character, etc., etc., he made it possible for Holmgren to commit the alleged perjury. Without Werta's *presence* in Court, without his *appeal* to the Court to be admitted as a citizen, without Werta's *holding out the defendant Holmgren* as *one* of his *witnesses,* and *vouching* for his witnesses' *integrity* and *veracity,* the defendant Holmgren never would, *never could,* have committed the alleged perjury. It required the presence of the applicant for citizenship (Werta) in the courtroom, to enable the defendant Holmgren, as Werta's witness, to commit the alleged perjury. Had not Werta been an applicant for citizenship; had he not,

as such, required the testimony of the defendant Holmgren; had he not gone to and been present in Court; had he not *vouched for* and consented and acquiesced to all that the defendant Holmgren said *in open Court on his behalf* on the subject of his residence, etc., etc.; had Werta, the applicant for citizenship, not done all of these things, the defendant Holmgren would have never been able to have perpetrated the alleged offense of perjury.

In brief, it required the actual and active participation of Werta to enable the defendant Holmgren to commit perjury on behalf of Werta.

At the very least, Werta was a principal in the second degree, because (1) he was *present;* (2) he *knew* of the *alleged perjury;* (3) he assisted by his *presence,* by his *conduct* in *Court,* by *vouching* for Holmgren as *one of his witnesses,* by accepting the *benefits* derived from his testimony as to *residence,* etc., and by *so testifying himself* as to make Holmgren's testimony *acceptable to the Court* and *substantiatory* of his own.

Under all these circumstances, Werta (the prosecuting witness) and Holmgren (the defendant) were accomplices in crime, for the alleged crime could never have been committed but for the concurrence or participation of both. As previously stated, Werta was a principal in the second degree. He was present and aided and abetted the fact to be committed in the several particulars pointed out.

A principal in the second degree is he who is present, aiding and abetting the fact to be committed.

Chitty on Crim. Law, vol. I, p. 255;
4 Bla. Com. 34;
Ency. of Pl. & Pr., vol. I, p. 60.

In the case of *Anderson* vs. *State,* 20 Tex. App. 312, the defendant was convicted of perjury in swearing to an affidavit as a teacher in a public school that he had taught school for a certain period, when he had not done so. It developed that certain school trustees knew of the falsity of this affidavit and in fact had made an arrangement with the defendant, to save the money allotted to their school district for teacher's salary, that the defendant, though not teaching for February (as to which he had made an affidavit that he had) should teach for the month of June ensuing.

It was held that the trustees were accomplices with the defendant, simply because they knew of the perjury and participated to the extent of signing a check in his favor for the month of February.

Say the Court: "This connection of the trustees with "the transaction made each one of them a *particeps* "*criminis* to the extent, at least, that his testimony "against the defendant should be held and treated as "accomplice testimony, and subject to the rules provid- "ing the necessity for corroboration of the same. The "testimony of McCrimmon was most important in "showing in connection with the witness Whitman, who "was the only other witness, that defendant had not "taught school in February. * * * Now the rule "is that in all cases where an accomplice a *particeps* "*criminis* testifies in behalf of the state, or where the

" evidence tends to show that one or more of the state's " witnesses are accomplices, the law in relation to such " testimony should be given in charge to the jury. (Cit- " ing authorities.) In the otherwise full and lucid " charge of the court in this case we fail to find any " instruction relative to the accomplice testimony, and " for this error of omission as to the law applicable to " the case, the judgment will be reversed and the cause " remanded for another trial."

This authority is also directly in point. The trustees were held to be accomplices because they knew the affidavit to be false.

In the case at bar the prosecuting witness Werta knew, if he is to be believed at all, that the defendant Holmgren was committing perjury to assist him (Werta) to become a citizen of the United States. If he did not actively procure Holmgren to testify falsely, he at least *permitted* and *allowed* Holmgren to testify falsely in his behalf and for his especial benefit, and held him out to the court as his witness and vouched for his integrity and veracity as a witness. He was certainly a *particeps criminis.* He knew of the perjury and assisted in it *as the applicant for citizenship.*

Persons who participate in forging an instrument are accomplices of the *one who utters it.*

Preston vs. *State,* 40 Tex. Cr. 72, 48 S. W. 581.

One who gives an officer a bribe to permit a breach of the law is an accomplice of the officer who is bribed, even where the statute makes bribery or an offer to bribe and the acceptance of a bribe distinct offenses.

People vs. *Bissert,* 72 N. Y. App. Div. 620, affirmed in 172 N. Y. 643, 65 N. E. 1120;
Ruffin vs. *State,* 36 Tex. Cr. 565, 38 S. W. 169;
People vs. *Winant,* 24 Misc. (N. Y.) 361, 53 N. Y. Suppl. 695.

Clearly, Werta, the prosecuting witness, was an accomplice, and while a conviction may be had in the Federal court on the uncorroborated testimony of an accomplice, nevertheless the *duty* rested on the trial Court to instruct and warn the jury as to the weight and credence to be given the testimony of an accomplice, and the danger of convicting unless the testimony of the accomplice be strongly corroborated. A reading of Werta's testimony will show that he is an ignorant, illiterate man. His testimony is a mass of contradictions and plainly indicates his irresponsibility and unreliability. While it did not appear in the case that he had actually been promised immunity for his perjury in the naturalization proceedings by testifying against the defendant Holmgren, it does appear that he had been arrested and subsequently detained as a witness for the United States and then secured his release on bonds. (Transcript of Record, pp. 79-80.) He has never been prosecuted on any charge by the Government. The danger of testimony, emanating from such a man as Werta, being colored, warped, exaggerated, and far beyond the truth, to serve the interests of the witness in escaping punishment himself is obvious. The liability to intimidation from fear of prosecution, and the anxiety to secure one's own freedom, are strong incentives in the heart of a weak, irresponsible and ig-

norant person to pervert the truth. As was aptly said by District Judge Shiras, in charging the jury in the case of *United States* vs. *Van Leuven, supra:*

> "There is always present to the mind of that person (the accomplice) the belief or understanding that if he testifies on behalf of the government he may be freed from prosecution, or escape punishment."

And yet it was upon this kind of testimony, and coming from such a witness, that the United States Attorney asked for a verdict of guilty, *without a word of caution from the Court as to the unreliability and grave danger of such evidence.* No other witness was called by the Government to show what the defendant said to the court at the time of the naturalization proceedings.

The instruction, by the trial Court, to the effect that each assignment of perjury must be established by the prosecution by the testimony of two witnesses or by the testimony of one witness and corroborating circumstances was not tantamount to advising and warning the jury as to the weight and credence to be given the testimony of an accomplice. To tell the jury that the assignments of perjury—the fact, that the particular statements, *if said,* were really false—must be established by the testimony of two witnesses or one witness and corroborating circumstances, is one thing. To tell the jury that the testimony of an accomplice is to be viewed with *care and caution,* is quite another thing in law. Neither can be confounded with the other. Each has its separate wise function and useful scope in the criminal law. The former is directed and limited

to the falsity of the particular statement charged to have been made; the latter is directed and confined to the degree of credibility to be accorded the testimony of an accomplice. And if the Government seeks to show that a defendant made a certain statement claimed to be false, and it is so unfortunate as to be compelled to rely, for proof of the fact that the statement was actually made, upon an accomplice, and not a disinterested witness, it may do so, but the jury should be advised and warned about convicting on such testimony of an accomplice.

Being an accomplice, we respectfully submit that the trial Court should have given the jury some appropriate instructions as to the weight to be accorded the testimony of the accomplice Werta, and should have warned them of the danger of convicting on the testimony of an accomplice, "unless he is confirmed and "corroborated in some material parts of his evidence "connecting the defendant with the crime by unimpeachable testimony."

(Language of Judge Maxey in *United States* vs. *Ybanez, supra.*)

IV.

Question Whether or Not Werta Was an Accomplice Should Have Been Submitted to the Jury.

The Circuit Court of Appeals for the Ninth Circuit held that Werta was not an accomplice of the defendant Holmgren, and that therefore the refusal of the trial court to give the requested instruction, or any instruc-

tion, bearing on the subject of accomplices, was not error.

We respectfully submit that it was not the province of the trial court or the Circuit Court of Appeals to pass upon the fact whether or not Werta was an accomplice. *That is always a question for the jury.* Where there is any evidence at all that could connect a witness with a crime, the question of his being an accomplice or not is one *entirely for the jury.* In a case like the one at bar, where all the circumstances and some of the testimony raise the question, it was manifestly improper for the trial court to refuse the instruction requested.

Bell vs. *State,* (Tex. Crim. App.), 47 S. W. 1010;
Rios vs. *State,* (Tex. Crim. App.), 48 S. W. 505;
People vs. *Bolanger,* 71 Cal. 17;
People vs. *Curlee,* 53 Cal. 604;
Hawkins vs. *State,* (Tex. Crim. App.), 47 S. W. 992.

In *People* vs. *Curlee, supra,* the Supreme Court of California said: "It was for the jury, however, to de-" termine whether he was an actual accomplice from all " his testimony and the other evidence before them."

In *Bell* vs. *State,* 39 Tex. Cr. 677, it was said:

"In every case where an accomplice testifies, the " judge should be careful not to assume in any manner " the truth of the accomplice's testimony, but leave the " truth of that, as well as all other evidence, *to be found* " *by the jury.*"

People vs. *Barker,* 114 Cal. 617;
People vs. *Compton,* 123 Cal. 403.

Werta, an alien, sought naturalization and was incompetent to prove his own residence. Holmgren, the defendant, who was competent, is alleged to have made false oath and supplied the necessary testimony as to Werta's residence. Werta allowed him to testify and accepted the benefits gained thereby. He had guilty knowledge of the perjury about to be committed, for he admits having paid one of his witnesses, Frank Johnson, $44, to appear as his witness. (Transcript of Record, p. 64.) He denies that he paid the defendant Holmgren a cent, or that the defendant Holmgren ever asked him for a cent of money. (Transcript of Record, pp. 64, 66.) Those are the circumstances. Werta's credibility, as to whether he was an accomplice or not, was for the jury to decide. The entire question was raised for the jury by the government and should have been submitted to the jury.

On all of the grounds urged, we respectfully and earnestly urge the granting of this petition for a writ of certiorari and a hearing before this tribunal.

WM. M. MADDEN,
Attorney for Petitioner.

I, the undersigned, counsel for the above petitioner, hereby certify that in my judgment the foregoing petition is well founded and I also certify that it is not interposed for delay.

WM. M. MADDEN,
Attorney for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

GUSTAV HOLMGREN, PETITIONER,
v.
THE UNITED STATES.
No. 718.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MEMORANDUM FOR THE UNITED STATES.

The petitioner was indicted in the United States District Court for the Northern District of California on a charge of taking a false oath in a naturalization proceeding. The indictment was in three counts.

On the first trial the defendant was acquitted on the first and second counts and convicted on the third. A new trial was granted, as a result of which the defendant was again acquitted on the first and second counts and again convicted on the third. The last count, on which the conviction was secured, charged that the defendant Holmgren appeared as a witness in the Superior Court of the city and county of San Francisco on the hearing of the application

for naturalization of one Frank Werta; that at such hearing he testified that said Werta had resided in the United States continuously for a period of five years, and, further, that he had resided in the United States continuously for three years immediately previous to his becoming 21 years of age; that he had continued to reside in the country from the time he became 21 until the time of the hearing, and that he, the defendant, had known the said Werta for five years.

It was further charged that this testimony was material to the issue and that it was false to the knowledge of the defendant.

A demurrer to the indictment, alleging that the federal court was without jurisdiction, was overruled and motions for a new trial and in arrest of judgment were denied. The judgment of conviction was unanimously affirmed by the Circuit Court of Appeals for the Ninth Circuit. The defendant now seeks to review the case in this court by a writ of certiorari.

Section 5395, Revised Statutes, under which the indictment was found, reads as follows:

> *Taking false oath in naturalization.*—In all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit who knowingly swears falsely shall be punished by imprisonment not more than five years nor less than one year, and by a fine of not more than $1,000.

The record discloses but two assignments of error of sufficient importance to demand the attention of this court.

It is urged, in the first place, that the jury were allowed to take into the jury room with them the indictment on which was indorsed a transcript of the proceedings in the first trial, showing that the defendant had been found guilty on the third count.

The opinion of the Circuit Court of Appeals (156 Fed., 439) contains a careful discussion of the authorities which seem to sustain the contention of the Government that on this point there was no prejudicial error.

It is further assigned as error that the demurrer should have been sustained on the ground that the federal court was without jurisdiction to punish the defendant for swearing falsely in a proceeding in a state court.

The Circuit Court of Appeals sustained the District Court on this point on the authority of *Schmidt* v. *United States*. (133 Fed., 257.) The jurisdictional question was fully discussed in that case, Judges Gilbert and Morrow holding that the federal court had jurisdiction, while Judge Ross filed a dissenting opinion.

The act of July 14, 1870 (16 Stat., 255), was an amendment to the naturalization laws. Section 1 penalized the making of a false oath or affirmation in any naturalization proceeding where such oath or affirmation was required, and section 4 provided that the courts of the United States should have jurisdic-

tion of all offenses under the provisions of the act in whatever court the same should have been committed. Section 1 was carried into the Revised Statutes as section 5395, and section 4 became section 5429, and in the revision reads as follows:

> The provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced.

The five preceding sections referred to (sections 5424 to 5428, inclusive) dealt with other offenses against the naturalization laws.

On behalf of the petitioner it is urged that section 5429 no longer refers to section 5395, and that the federal court was, therefore, without jurisdiction.

While the Government believes that the case was correctly decided below, the question whether or not the United States can punish an individual for swearing falsely in a naturalization proceeding in a state court is important, and, in view of the difference of opinion in the Circuit Court of Appeals, may merit the consideration of this court.

HENRY M. HOYT,
Solicitor-General.

APRIL, 1908.

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In the Supreme Court of the United States

OCTOBER TERM, 1909

GUSTAV HOLMGREN, PETITIONER,
vs.
THE UNITED STATES.
No. 132.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

Certain statements contained in the Brief for the United States are, in our judgment, erroneous and compel us briefly to reply.

I.

JURISDICTION.

The very able Counsel for the United States, evidently somewhat apprehensive of our contention that Section 5395 of the Revised Statutes, under

which the petitioner was indicted, tried and convicted, may not be held by this Court impliedly to be included within the omnibus provisions of Section 5429 of the Revised Statutes, seeks to show that the judgment of conviction against the petitioner might also be supported under two other statutes; one, Section 5392 of the Revised Statutes relating to perjury, and the other, "the last paragraph of Section 39, Act of March 3, 1903, entitled "an Act to regulate the Immigration of aliens into the United States." (32 Stat., 1213, 1222.)

A complete answer to such a suggestion is that the petitioner was indicted, tried and convicted under Section 5395 of the Revised Statutes, and not under any other law or Statute.

It is manifestly unfair and unjust to the petitioner that, at this late day, and in this Court of last resort, and for the first time, the contention should be made that the judgment of conviction can be supported by other laws or Statutes, to which the petitioner's attention was never called, and as to which he had no opportunity to prepare his defense.

Such a proceeding should not be countenanced by this Court and is, in our judgment, violative of the petitioner's constitutional rights.

The indictment discloses affirmatively that the petitioner was proceeded against and charged with

crime under Section 5395 of the Revised Statutes. (See Indictment, Trans. of Rec. pp. 4-6) He prepared for his defense, having in view the provisions of Section 5395 of the Revised Statutes, and not of any other law or Statute, with the violation of which he was not charged.

A perusal of the record will fail to disclose that any law or statute, other than Section 5395 of the Revised Statutes, was ever alluded to by Counsel for the Government in the entire prosecution of the case, which resulted in the judgment of conviction.

The objections of Counsel for petitioner to the admissibility of evidence introduced against the petitioner, and his offers of proof on behalf of the petitioner, were predicated and based on the elements of the offense denounced by Section 5395 of the Revised Statutes, and not of any other Statute or law. The same is true of the instructions to the Jury requested by Counsel for the petitioner, and of his objections to the charge of the Court. All these objections were based on the provisions of Section 5395 of the Revised Statutes, and not of any other law or Statute, with the violation of which the petitioner was not accused.

The charge of the trial Court will disclose that the Judge instructed the Jury as to the elements of the offense charged against the petitioner under

Section 5395 of the Revised Statutes, and not of any other Statute or law. (See charge of Court, Trans. of Rec. pp. 72-75.)

The objections and exceptions of Counsel for petitioner to the charge, as delivered, to the jury were based on the elements of the offense contained in Section 5395 of the Revised Statutes, and not of any other law or Statute. (See Objections and Exceptions taken to Judge's charge, Trans. of Rec. pp. 76-78; especially page 78)

The demurrer to the indictment was drafted to an indictment drawn under Section 5395 of the Revised Statutes, and not to some other Statute or law, which the ingenuity of Counsel for the Government has at this late day resurrected and which he now invokes.

The Circuit Court of Appeals, in the opening sentence of its opinion, states: "The plaintiff in error was indicted for violation of Section 5395 of the Revised Statutes." (See Trans. of Rec. p. 91)

We respectfully submit that it is both unfair and unjust to this petitioner now to endeavor to support a weak judgment of conviction by calling in the aid of Statutes or laws denouncing crimes for the violation of which the petitioner was never indicted, tried or convicted.

But, aside from the manifest injustice of such

a position, an examination of the two Statutes referred to by Counsel for the United States will show that they are inapplicable.

The first Statute referred to by Counsel for the Government, to wit: Section 5392 of the Revised Statutes, relates to perjury committed in the Federal Courts and not State Courts. The concluding part of the Section provides that after conviction the offender "shall, moreover, thereafter be incapable of giving testimony in any Court of the United States, etc." This clearly indicates that this Section is confined to perjuries committed in Federal Courts, and it has always been so regarded by the profession.

Aside from this, the crime of perjury denounced by Section 5392 of the Revised Statutes is a different crime from "taking or making" a false oath or affidavit, which is denounced by Section 5395 of the Revised Statutes, (the Section under which the petit[illegible] was indicted, tried and convicted). The offenses of perjury and the "making or taking" of a false oath, while belonging to the same general class of crime, are essentially two different and distinct offenses, and the elements of the offenses are different and the proof to establish such elements different.

The perjury, denounced by Section 5392 of the Revised Statutes, must not only be wilfully and

knowingly false but it must be maliciously or corruptly false.

Mere rash or reckless swearing to something that is not true, or without any corrupt or malicious motive, does not constitute perjury, as understood at common law and at the present time.

United States vs. Shellmire, Fed. Cas. 16271.
United States vs. Edwards, 43 Fed. Rep., 67.
Hughes on Inst. to Juries, Sec. 276.
State vs. Higgins, 124 Mo., 640; 28 S. W. R., 178.
Hix vs. People, 157, Ill., 382; 41 N. E., 862.

But, the "taking or making" of a false oath, under Section 5395 of the Revised Statutes, need not be corrupt or malicious. It is sufficient if it is knowingly and wilfully false.

This was the theory of the prosecution all through the case and was likewise the charge of the trial Court. (See charge to the jury, Trans. of Rec. p. 73.)

It was the view likewise taken by the Circuit Court of Appeals. "It is said that the Court erred in failing to charge the jury that the perjury must be corrupt and malicious, as well as knowing and wilful. Section 5395 of the Revised Statutes, under which the plaintiff in error was indicted, denounces a penalty against one 'who knowingly swears falsely in making any oath under any law relating to

naturalization.' The Court in charging the jury instructed them that they must be satisfied beyond all reasonable doubt not only that the testimony alleged to be given was false, but that it was wilfully and knowingly false, 'that he wilfully and knowingly testified falsely.' This was clearly sufficient. It was not necessary in order to commit the offense defined in the Statute that there should have been any purpose of gain or any instigation of malice. In United States vs. Edwards 43 Fed. 67, it was held that an indictment under the Statute must allege that the false oath was taken wilfully, and that an allegation that it was corruptly taken does not embrace the elements of wilfullness." (See opinion of Circuit Court of Appeals, Trans. of Rec. pp. 95-96)

Therefore, it is obvious that the provisions of Section 5392, denouncing the crime of perjury, cannot be made to apply to the offense of "making or taking" a false oath, with which the petitioner was accused and convicted under the provisions of Section 5395.

The same observations apply to the other Statute cited by counsel for the United States, to wit: "the last paragraph of Section 39, Act of March 3, 1903."

But, with reference to this last Statute, it is to be observed that it has since been repealed by

the Act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States." (35 Stat. 1088; See last paragraph of Section 341)

Moreover, both Sections 5392 of the Revised Statutes and the last paragraph of Section 39, Act of March 3, 1903, are subject to the same objection, which we make in our opening brief, in that they are not expressly referred to, in or within the purview of, Section 5429 of the Revised Statutes, which makes only the five preceding Sections (Secs. 5424-5428) applicable to all proceedings had or taken before ANY COURT in which any proceedings for a naturalization may be commenced.

Section 5392 of the Revised Statutes is not one of the five preceding Sections referred to in Section 5429 of the Revised Statutes, and the Act of March 3, 1903, was passed long after the enactment of section 5429 as a part of the Revised Statutes.

CONGRESS, IN ENACTING THE NEW CRIMINAL CODE OF THE UNITED STATES, WHICH WENT INTO EFFECT ON JANUARY 1, 1910, UNEQUIVOCALLY SHOWS THAT IT CONSIDERED THAT THE PROVISIONS OF SECTION 5429 DID NOT APPLY AT ALL TO SECTION 5395 OF THE REVISED STATUTES.

It is, we think, a most significant circumstance that, in the new Criminal Code of the United States, which went into effect on January 1, 1910, (Act of March 4, 1909, entitled: "An Act to codify, revise, and amend the penal laws of the United States;" 35 Stat. 1088) Congress expressly makes the provisions of Section 5395 of the Revised Statutes applicable to naturalization proceedings in ANY Court,—whether Federal or State. This clearly shows that Congress, in enacting the new Criminal Code of the United States, appreciated that there was no law in existence in the Revised Statutes which made the provisions of Section 5395 of the Revised Statutes, under which the petitioner was indicted, tried and convicted, applicable to naturalization proceedings in the State Courts. It, therefore, expressly provided in the new Criminal Code of the United States that Section 5395 of the Revised Statutes, or its substitute in the new law (Section 80 of the Act of March 4, 1909.) should be made applicable to naturalization proceedings in ANY Court.

No better argument could be offered by us than to call the attention of this Court to this express provision in the recent Criminal Code of the United States, which went into force on January 1st, 1910. In that Act, Section 5395 of the Revised Statutes is reproduced as Section 80 thereof. The very next Section, to wit: Section 81 of the new Crim-

inal Code, which is the substitute for Section 5429 of the Revised Statutes, provides as follows:

"Section 81:

> The provisions of the five Sections last preceding shall apply to all proceedings had or taken, or attempted to be had or taken, before any Court in which any proceeding for naturalization may not be commenced or attempted to be commenced, and whether such Court was vested by law with jurisdiction in naturalization proceedings or not."

This legislation by Congress in the new Criminal Code of the United States, in which it expressly makes Section 5395 of the Revised Statutes, (or its substitute in the new law—Section 80), one of the five Sections, for violation of which in ANY Court prosecution may be had in the Federal Courts, establishes exactly what we contended for in our opening brief, viz: That there was no Statute in existence, at the time petitioner was indicted, tried and convicted for a violation of Section 5395, which, IN PLAIN AND UNMISTAKABLE TERMS, conferred jurisdiction upon the Federal Courts to punish perjuries and false oaths committed in naturalization proceedings in State Courts; and Congress, appreciating this condition of the law, in enacting the new Criminal Code of the United States to take effect January

1, 1910, expressly provides for this hiatus in the old law, and NOW, IN PLAIN AND UNMISTAKABLE TERMS, provides that: "The provisions of the five Sections last preceding shall apply to all proceedings * * * before ANY Court in which any proceedings for naturalization may be commenced, etc."

In other words, Congress now makes Section 5395 of the Revised Statutes *one of the five preceding sections,* which it had not done in the law as it stood when the petitioner was indicted, tried and convicted.

CONGRESS HAS NO POWER TO PASS A FEDERAL STATUTE ASSUMING JURISDICTION OF PERJURIES AND FALSE OATHS COMMITTED IN STATE COURTS.

We respectfully submit that Counsel for the United States, in his brief on pages 10 and 11, has failed satisfactorily to answer the point we make that Congress has no power to pass a Federal Statute assuming jurisdiction of perjuries and false oaths committed in State Courts, even though committed in naturalization proceedings. As was well said in the case of Teall vs. Felton, 1 N. Y. 537, 546: "The want of jurisdiction in such cases depends upon principles older than the Federal Constitution, and wholly independent of it."

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It is "a settled principle in jurisprudence that one sovereign State cannot make use of the municipal Courts of another State, to enforce its penal laws. * * * As to its judicial powers, and its penal laws, the Government of the United States is as much an independent State and separate Government as Great Britain or France, or either of the United States."

United States vs. Campbell, Tappan 61, 63 (1816).

See, to the same effect, the following cases:

Worthington vs. Masters, 1 Hall. Jour. Jur., 196, 205 (1803).

State vs. Rutter, 12 Niles Reg., 115, 117 (1818).

United States vs. Smith, 1 Southard, 33, 36 (1818); dis. op.

United States vs. Lathrop, 17 Johns, 4, 9 (1819).

Brown vs. United States, 2 Am. L. T. Rep. n. s., 464, 467 (1875).

See, also:

Meade vs. Deputy Marshal, 2 Qr. Cr. Cas., 569, 570 (1813).

Jackson vs. Rose, 2 Va. Cas., 34, 36 (1815).

Davison vs. Champlin, 7 Conn., 244, 249 (1828).

Ely vs. Peck, 7 Conn., 239, 242 (1828).

State vs. Penny, 10 Ark., 621, 629 (1850).

Pratt, J., in People vs. Sweetman, 3 Park. Cr. Cas., 358, 373 (1857).

Brigham vs. Claflin, 31 Wis., 607, 611 (1872).

Newell vs. National Bank, 12 Bush., 57, 59 (1876).

Chesapeake R. Co. vs. Bank, 92 Va., 495, 502 (1896); 10 Ann. Cong., 893 (1801).

Contra, in State vs. Wells, 2 Hill (S. C.), 687, 694 (1835).

We respectfully commend to the consideration of the Court an article, entitled "The Delegation of Federal Jurisdiction to State Courts by Congress," which appeared recently in the Am. Law Review, Vol. 43 (No. 6—Nov.-Dec., 1909), p. 852, and which contains an interesting discussion of the question and collates many of the cases in which this all-important and embarrassing question has arisen.

II.

MISCONDUCT.

SUBSTANTIAL ERROR—INDICTMENT GIVEN TO JURY.

Counsel for the Government, in discussing the second point urged, to-wit: misconduct of the trial Court and its officials and the jury, to the substantial prejudice of the petitioner, in giving the indictment to the jury, seems to misapprehend our contention.

We do not, for a moment, complain of the failure of the trial Court to grant a new trial, and do not contend that such ruling is subject to review by this Court.

We thoroughly concur with the statement of the law made, in this connection, by counsel for the Government, to the effect that "no principle is more firmly established by this Court than that the allowance or refusal of a new trial rests in the sound discretion of the Court to which the application is addressed, and the result cannot be made the subject of review by writ of error." And the many cases cited by counsel for the Government fully support such principle. (See Brief for United States, p. 12.)

But, what we do contend for is, that it was gross error for the trial Court to permit the jury to take with them to the jury-room, and retain during their deliberations, the indictment in the case, which gross error was to the substantial prejudice of the petitioner, as was held in the case of Ogden vs. United States, 112 Fed., 523.

The only answer, urged by counsel for the Government, is that the record, or more properly speaking, the bill of exceptions, does not disclose that an objection was made by the attorney for the defendant.

Our reply to that is (and we cited numerous

authorities in support thereof in our opening brief), that an objection is not necessary where the record discloses that such misconduct actually took place and constitutes substantial error, or, in other words, violates the defendant's substantial right to a fair and impartial trial. The record shows, on page 76 thereof, that such misconduct actually took place.

Moreover, we respectfully submit that the lack of an objection should not be held fatal to the petitioner's paramount constitutional right to a fair and impartial trial, which he certainly did not have with evidence before the jury of the adverse result of a previous trial on the identical charge upon which he was being tried. If, as was said by the Circuit Court of Appeals for the Third Circuit in the Ogden case, "it was a *gross violation* of the rights of the defendant below that they (the indictments) should have been handed to them at all in the manner in which they were," then no failure of his counsel to object, whether excusable or not, could militate against the petitioner or deprive him of his substantial and constitutional right to a fair and impartial trial.

But, in a criminal case, the Appellate Court, in the interests of justice, will often notice substantial errors, even though no objection be made by counsel in the trial Court.

As was recently said by this Court, through

Mr. Justice Peckham, in the case of Crawford vs. United States, 212 U. S., 183, 194; 53 L. Ed., 465, 470: "In criminal cases Courts are not inclined to be *as exacting* with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, *although the question was not properly raised at the trial by objection and exception.*" (Citing Wiborg vs. United States, 163 U. S., 632, 659; 41 L. Ed., 289, 299; 16 Sup. Ct. Rep., 1127, 1197.)

We fail to appreciate the argument of counsel for the Government, on page 22 of his brief, at the bottom thereof, wherein he contends, that: "The record fails to disclose that the plaintiff in error was prejudiced by the fact that the indictment with the indorsement complained of thereon was in possession of the jury."

Counsel, in one breath, contends that the record fails to disclose that the plaintiff in error was prejudiced, and, in the next breath, when it is pointed out that the Transcript of Record, on pages 83-84, contains the affidavit of Juror Carpenter, who swore: "that the fact appearing on said indictment created an unfavorable opinion against said defendant," *then* contends that "this statement cannot be considered by the Court." (Citing Mattox vs. United States, 146 U. S., 149.) (See page 29, lines 5-6, of Brief for the United States.)

III—IV.

ACCOMPLICE.

We respectfully submit that counsel for the United States has completely failed to refute the argument we made in the Opening Brief, and to differentiate the cases we there referred to, to the effect that the prosecuting witness (Werta) was an accomplice with the petitioner, and that therefore the trial Court should have instructed the jury accordingly.

In perjury, all persons having a knowledge of the falsity of the statements and aiding in the crime are accomplices.

Cyc., vol. 12, p. 446, and cases there collated.
Smith vs. State, 37 Tex. Cr., 488; 36 S. W., 586.
Anderson vs. State, 20 Tex. App., 438.
Blakely vs. State, 24 Tex. App., 616; 7 S. W., 233; 5 Am. State Rep., 912.
State vs. Scott, 28 Or., 331.

At the very least, and unquestionably, the prosecuting witness (Werta) was a principal in the second degree. He was present, aiding and abetting the fact to be committed.

Chitty on Crim. Law, vol. 1, p. 225.
4 Bla. Com., 34.
Ency. of Pl. & Pr., vol. 1, p. 60.

It is next contended by counsel for the United States that the requested instruction did not state the law applicable, and therefore affords no ground for reversal.

But this point is not well taken, for, as was recently said by this Court, in the case of Crawford vs. United States, supra: "In criminal cases Courts are not inclined to be *as exacting* with reference to the *specific character of the objection* made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, *although the question was not properly raised at the trial by objection and exception.*"

The instruction requested by counsel for the defendant (petitioner) certainly called the attention of the trial Court to the fact that Werta (the prosecuting witness) *was an accomplice.* (See Trans. of Rec., pp. 22-76-79.)

If this requested instruction did not accurately state the law on the subject, it was the duty of the trial Court to modify it as it saw fit.

While, technically, the learned judge of the trial Court may have been correct in refusing to give an instruction in the precise language requested by counsel for petitioner, nevertheless the duty rested upon him to give to the jury some appropriate instructions, telling them (to use the language of Judge Maxey in U. S. vs. Ybanez, 53 Fed., 536,

540) that the testimony of an accomplice is "always to be received with caution, and weighed and scrutinized with great care by the jury."

Said this Court, in the case of Crawford vs. United States, 212 U. S., 183, 204; 53 L. Ed., 465, 474: "But the evidence of a witness, situated as was Lorenz (an accomplice), is not to be taken as that of an ordinary witness of good character in a case, whose testimony is generally and prima facie supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and *ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.* In many jurisdictions such a man is an incompetent witness unless he has been pardoned. The facts surrounding this case make it particularly important that the rule in regard to material errors should be most rigidly adhered to. *If it be not clear that no harm could have resulted from the commission of this material error, the judgment should be reversed.*"

The jury in the case at bar was left in total ignorance, by the trial Court, as to how it should weigh and consider the testimony of the accomplice—the prosecuting witness—Werta.

We do not understand that a trial Court, in a criminal case, is limited to the precise instructions

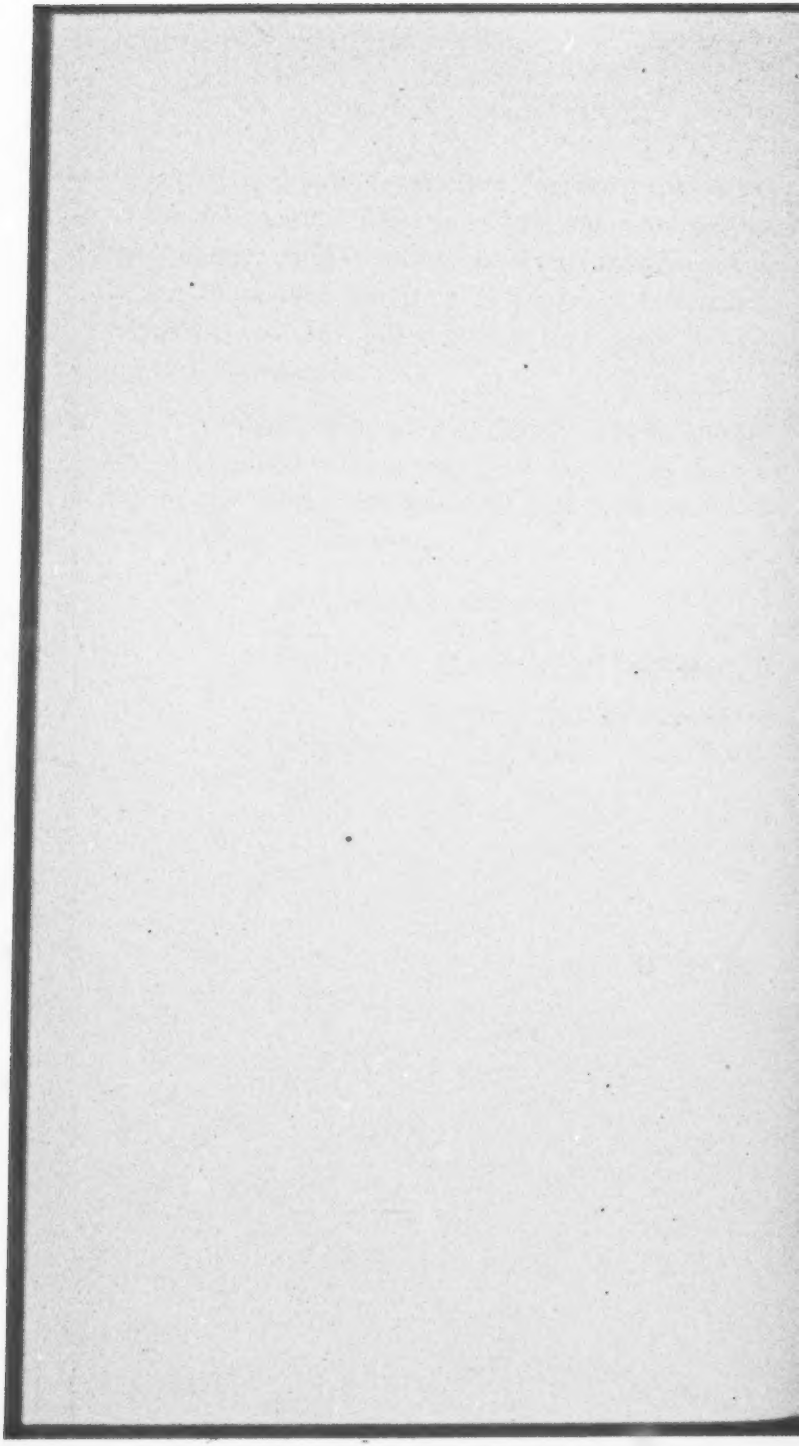
requested by counsel—whether for the prosecution or the defendant. The trial Court has undoubtedly the inherent power, *and it is its imperative duty,* to see to it that the jury is properly instructed, regardless of any instructions that may be requested by counsel.

We respectfully submit that the able counsel for the United States has been unable to refute any of the contentions made in our Opening Brief in support of a reversal.

Respectfully submitted,

MARSHALL B. WOODWORTH,

Attorney for Petitioner.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

GUSTAV HOLMGREN, PETITIONER,
v.
THE UNITED STATES.
No. 132.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Plaintiff in error was indicted in the United States District Court for the Northern District of California for swearing falsely in a naturalization proceeding had in a court of said State. He was convicted and assessed a fine of $300 and sentenced to imprisonment for a term of three years (R., p. 16). This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit. In the petition to this court for a writ of certiorari, three grounds are presented upon which it is insisted that the judgment

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of the trial court should be set aside and the case remanded to that court for a retrial. As the second ground is a fundamental one, it will be first considered.

I.

The Federal courts have jurisdiction to inflict punishment for the offense of perjury committed in naturalization proceedings had in State courts.

The Federal courts have jurisdiction of the offense charged in this case under either of the three following statutes, to wit:

First. Section 5392, Revised Statutes:

> Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

Article I, section 1, clause 4 of the Constitution vests Congress with the power "to establish a uniform rule of naturalization." Acting under the authority thus conferred, Congress has enacted gen-

eral laws which exclusively control naturalization proceedings. These laws are found in Title 30, sections 2165 to 2174 of the Revised Statutes. Section 2165 reads as follows:

> An alien may be admitted to become a citizen of the United States in the following manner, *and not otherwise* * * *.

The proceedings in which Holmgren gave false testimony were had exclusively under these statutes, and the oath administered to him was, therefore, administered in a "case in which a law of the United States authorizes an oath to be administered." The case of *In Re Loney* (134 U. S., 372, 374) is directly in point. It was there held that the courts of a State have no jurisdiction of a complaint for perjury committed in testifying before a notary public of the State in a proceeding wherein the election of a member of the House of Representatives of the United States is contested. The ground of this decision is thus stated by the court:

> But the oath of a witness in the case of a contested election of a Member of the House of Representatives of the United States is not required by any law of Virginia, but is an oath authorized to be administered by the laws of the United States, and by those laws only; and the witness gives his testimony in obedience to to those laws, and not in the performance of any duty which he owes to the State in which his testimony is taken.
>
> Any one of the officers designated by Congress to take the depositions of such witnesses

> (whether he is appointed by the United States, such as a judge of a federal court or a register in bankruptcy, or by the State, such as a judge of one of its courts of record, a mayor or recorder of a city, or a notary public) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress, and in a matter concerning the Government of the United States.

The reasoning of the court is equally applicable to the case at bar, and this general section defining perjury and fixing the punishment therefor clearly embraces this case.

Second. Section 5395, Revised Statutes:

> In all cases where any oath or affidavit is made or taken *under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws*, any person taking or making such oath or affidavit who knowingly swears falsely shall be punished by imprisonment not more than five years, nor less than one year, and by a fine of not more than one thousand dollars.

It was under this section that the trial court and the Circuit Court of Appeals held that Federal courts have jurisdiction of the present case, without considering either of the other statutes to which reference is herein made.

It is not and can not be denied that the oath administered to Holmgren was taken under and by virtue of a law relating to the naturalization of aliens, and in a proceeding under such law; and this section

of the Revised Statutes clearly and, unless there is some other section which must limit its scope, necessarily includes the charge set forth in the indictment and proven upon the trial. It is insisted, however, that the courts should restrict the unambiguous language of this section, and make it applicable alone to perjuries committed in naturalization proceedings in United States courts, for the following reason: This section was taken from section 1 of the act of July 14, 1870, entitled "An act to amend the naturalization laws and to punish crimes against the same, and for other purposes." (16 Stat., 254.) This statute contained two additional sections wherein the doing of certain other acts in connection with the naturalization of aliens were declared to constitute felonies; and the fourth section of said act, which followed the several sections above mentioned, read as follows:

> Sec. 4. *And be it further enacted,* That the provisions of this act shall apply to all proceedings had or taken or attempted to be had or taken before any court in which any proceeding for naturalization shall be commenced, had, or taken, or attempted to be commenced; and the courts of the United States shall have jurisdiction of all offenses under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed.

In codifying this act the first section was made section 5395 of the Revised Statutes, which is a part of chapter 4, title 7, entitled "Crimes against justice," while sections 2 and 3 were made sections 5424

to 5428, being a part of chapter 5 of said title, entitled "Crimes against the operations of the Government;" and section 4 appears as section 5429, likewise a part of said chapter 5, and reads as follows:

> The provisions of *the five preceding sections* shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced.

The insistence is that because this provision is not upon its face made to apply to section 5395, as it did apply in the original statute, and is limited by its express terms to the five preceding sections, then it must be held that Congress intended that section 5395 does not include perjuries committed in naturalization proceedings in the state courts.

This question, it appears, has been heretofore considered by seven judges of the United States courts. It was first fully and ably discussed by District Judge Thomas in *United States* v. *Severino* (125 Fed., 949), and the jurisdiction was maintained by him upon the ground that section 4 of the original statute was technically surplusage, but was practically a useful aid to interpretation.

The question next arose in the Circuit Court for the District of Washington in *Schmidt* v. *United States;* and jurisdiction was maintained by that court; and on appeal, the case was affirmed by the Circuit Court of Appeals for the Ninth Circuit, the court being composed of Circuit Judges Gilbert and Ross and

District Judge Hunt. In the present case, the jurisdiction was upheld in the District Court for the Northern District of California, and the holding of that court was affirmed by the same Circuit Court of Appeals, Circuit Judge Morrow, however, sitting in the place of District Judge Hunt. The only judge who has so far taken a contrary view is Judge Ross, who delivered a dissenting opinion in the said case of *Schmidt* v. *United States*. (133 Fed. 257, 264.) The Circuit Court of Appeals in that case, speaking through Judge Gilbert held that section 5395, Revised Statutes, is as broad in its application as the first section of the said act of 1870, basing this declaration upon the following principles: That it is a settled rule that a change of phraseology in revision of statutes will not be regarded as altering the law where it has been settled by plain language in the statutes, unless it is clear that such was the intent, citing *McDonald* v. *Hovey* (110 U. S., 619, 629), *United States* v. *Ryder* (110 U. S., 729, 740), *Logan* v. *United States* (144 U. S., 263, 302), *Doyle* v. *Wisconsin* (94 U. S., 50); and that it is an established tenet of construction, that in finding the meaning of an ambiguous statute in the revision, the courts are permitted to refer to the original statute from which the section was taken to ascertain from its language and context to what class of cases the provision was intended to apply, citing "*The Conqueror*," (166 U. S., 122), *United States* v. *Bowen* (100 U. S., 508), *Myer* v. *Car Company* (102 U. S., 11), *United States* v. *Lacher* (134 U. S., 626).

It is clear, however, that there is not the least ambiguity in the language of section 5395, Revised Statutes. Section 5429 does not mention in terms either the State courts or Federal courts, but declares generally that the five preceding sections shall apply to all proceedings had or taken before *any* court in which any proceeding for naturalization shall be commenced. Nor does section 5395 refer in terms to either the Federal or State courts, but applies to "all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens or in any proceedings under such laws." If then the omission to make section 5429 specifically apply to section 5395 restricts that section to cases tried in one class of courts, why insist that such class is the Federal courts? Why is it not just as reasonable to insist that section 5395 applies to proceedings had *in State courts* alone, and does not include those had in Federal courts at all? In fact, there is more reason for such a contention, in case it should be held that the general statute relating to perjury does not include naturalization cases in State courts. There can be no question that such general statute is applicable to such proceedings in the Federal courts; and if it should be held that it does not apply to such proceedings in State courts, then to likewise hold that section 5395 does not apply would leave (in the absence of the statute hereinafter referred to) punishment for the commission of perjury in such proceedings in State courts entirely unprovided for. This is especially true in view of the fact that the

courts of some States have held, that inasmuch as naturalization cases are authorized and governed entirely by United States statutes, perjury committed therein constitutes an offense solely against the United States, and that such offender can not be punished by the State courts. Manifestly, Congress never intended such a result; and its purpose was to provide that by section 5395 every person who should commit perjury in any naturalization case, regardless of the court in which it might be pending, should be subject to the penalty therein prescribed.

Third. The last paragraph of section 39, act of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States" (32 Stat., 1213, 1222) reads as follows:

> That any person who knowingly aids, advises, or encourages any such person to apply for or to secure naturalization or to file the preliminary papers declaring an intent to become a citizen of the United States, *or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact*, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not less than one nor more than ten years, or both.

This act was approved March 3, 1903, and went into effect ninety days thereafter. The false testimony upon which the indictment in this case was based was given on September 21, 1903 (R., p. 49),

or more than three months after this statute took effect. The provision that anyone who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, is unquestionably broad enough in its terms to apply to proceedings in all courts; and there is nothing in the context to restrict its meaning, and to exclude therefrom the proceedings in which Holmgren testified falsely.

Naturalization proceedings in state courts valid.

It is insisted in plaintiff in error's brief for the first time that Congress has no power to confer jurisdiction upon State courts to naturalize aliens, and that, therefore, the naturalization proceedings in question were had under State laws, and not under the act of Congress.

The validity of such proceedings in State courts, when had under acts of Congress, has been recognized from the early history of the Government.

> *Campbell* v. *Gordon* (6 Cranch, 176, 182).
> *Stark* v. *Chesapeake Ins. Co.* (7 Cranch, 420).
> See also cases cited in 2 Cyc. Law & Proced., pp. 111, 112.

It does appear that the Constitution of California (sec. 5, Art. VI) vests in the Superior Courts "the power of naturalization, and to issue papers therefor," and that section 76, Code of Civil Procedure of that State, declares that such courts shall have the power of naturalization and to issue papers therefor. But these provisions remove all doubt that might otherwise exist about the matter. Certainly Congress had, under the Constitution of the United

States, the power to enact a uniform system of naturalization laws, and to require their enforcement; and since the Constitution and the statutes of the State of California expressly vest jurisdiction in its Superior Courts to enforce these laws, there can be no question about the validity of the proceedings, and that plaintiff in error's false oath was perjury.

Furthermore, it can make no difference from what source the court originally derived its jurisdiction to administer the oath. It was in fact administered under a statute of the United States, and the false testimony was given in a proceeding which was had entirely by virtue of such statute; and it was the administration of United States laws that was debauched thereby.

II.

A new trial should not be awarded on the ground that the jury had in their possession, while considering their verdict, the indictment upon which had been written the finding of a former jury that plaintiff in error was guilty on the third count of the indictment.

This fact affords in this court no ground for a new trial for the following reasons:

First. *The trial court in passing upon the motion for a new trial accepted and considered the affidavits here relied upon by plaintiff in error, and his action in refusing a new trial upon consideration of said affidavits was within his discretion, and is not subject to review by this court.*

No principle is more firmly established by this court than that the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result can not be made the subject of review by writ of error. (*Henderson* v. *Moore* (5 Cranch, 11, 12), *Marine Insurance Co.* v. *Young* (5 Cranch, 187, 191), *McLanahan* v. *Insurance Company* (1 Pet., 170, 183), *United States* v. *Buford* (3 Pet., 12, 32), *Indianapolis, etc., R. R. Co.* v. *Horst* (93 U. S., 291, 301), *Kerr* v. *Clampitt* (95 U. S., 188), *Newcomb* v. *Wood* (97 U. S., 581, 583), *Mattox* v. *United States* (146 U. S., 140, 147), *Haws* v. *Victoria Copper Mining Company* (160 U. S., 303, 313), *Ogden* v. *United States* (112 Fed., 523, 525; opinion by Judge Gray).

The cases of *Ogden* v. *United States* and *Mattox* v. *United States, supra,* are especially relied on by plaintiff in error. The former case presented a state of facts similar to those in the case at bar, it having been made to appear by affidavits that the jurors took with them and kept during their deliberations in the jury room the indictment upon which was indorsed the verdict of guilty found by a jury on a former trial.

However, there is a very material difference in the condition of the records in the present case and in the *Ogden* case. In that case the record disclosed the fact that immediately upon the rendering of the verdict defendant's counsel asked leave to move for a new trial, which request was refused by the court, and that subsequently affidavits setting forth the

facts above stated were presented to the court, *but he declined to consider them* on the ground that leave to move for a new trial had already been refused; and the appellate court expressly held that it entered upon a consideration of the question *because the trial court had refused to give any consideration to these affidavits.* But it is insisted by plaintiff in error that the action of the court in holding that the affidavits presented a good ground for a new trial, and in reversing the case and awarding a new trial instead of directing that the trial judge consider the affidavits, is authority for the contention that this court should in this case consider the affidavits presented herein, and if found sufficient should grant to plaintiff in error a new trial. This contention is not sound. In *Mattox* v. *United States, supra*, on a motion for a new trial, the trial court refused to entertain affidavits showing that the jury read, while considering the verdict, an unfavorable article published in a newspaper, and also that the officer in charge of the jury made to them during the progress of the trial damaging remarks with reference to the defendant. This court, speaking through the Chief Justice, reaffirmed the general rule that the refusal of a new trial rests in the sound discretion of the court to which the application is addressed, but held that *inasmuch as the trial court had refused to entertain the affidavits* he did not exercise any discretion in respect to the matter, and that, therefore, this court was not bound by his action; and, as the Circuit Court of Appeals did in the *Ogden* case, the court proceeded to review the

affidavits, and finding that they afforded good ground for reversal, held that the case should be reversed upon that as well as another ground set forth in the opinion.

In *United States* v. *Reid* (12 How., 360, 366) the question was discussed whether or not the trial court should consider the affidavits of jurors wherein it was stated that whilst impaneled they had read a newspaper report of the evidence, but that such fact had had no influence upon their verdict. The court held that the affidavits were insufficient to justify the granting of a new trial, but suggested that a case might arise in which it would be impossible to refuse to consider affidavits of that character without violating the plainest principles of justice. However, the question arose in that case upon a certificate of division in opinion between the judges of the trial court, and is not authority upon the present question. On the other hand, in *Kerr* v. *Clampitt*, *supra*, it appeared that the affidavits upon which the plaintiff in error relied had been considered by the trial court, and this court, speaking through Justice Field, said:

> We have no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous its decision. The final judgment can not be examined through the rulings of the lower court upon that question. If, therefore, when the final judgment is brought before us for review by writ of error no other documents are presented

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> for our consideration than such as were before the inferior court upon the application for a new trial, we can not look into them; and, if error is not otherwise disclosed by the record, the judgment must be affirmed.

Likewise in *Haws* v. *Victoria Copper Mining Company, supra*, the trial court had received and considered the affidavits presented by plaintiff in error on his motion for a new trial, and this question was thus disposed of in the opinion delivered by Mr. Justice White:

> The contention that the trial court did not consider the affidavits as to the newly discovered evidence presented for the purpose of obtaining a new trial, is fully answered by the order refusing the new trial, which recites: "That it was heard upon the record and statement and upon the affidavits filed by the defendants in support of their motion." This takes the case entirely out of the principle announced in *Mattox* v. *United States* (146 U. S., 140). That case involved a refusal to exercise discretion, whilst the contention here amounts to the assertion of a right to control a discretion when it has been lawfully exerted.

It appears, therefore, from these several authorities, that when the trial court refuses to receive and consider affidavits which present legitimate grounds for a new trial, the *appellate court may exercise the discretion which should have been exercised by that court*, and may not only remand the case to the court below with directions that that court shall rehear the motion for a new trial and consider upon such rehearing

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the affidavits offered, *but may itself award such new trial. While, on the other hand, if the trial court has on disposing of the motion received and considered the affidavits, the question no longer remains an open one, and the appellate court is bound thereby.*

Second. *The trial court's attention was not called to the fact that said indictment with the endorsement complained of thereon was handed to the jury when the same was done, but it was first mentioned in the motion for a new trial; and, no objection having been made and the court's ruling thereon required at the time the alleged error occurred, it affords no ground for a new trial.*

The necessity of objecting when the indictment was passed to the jury was not considered in the case of *Ogden* v. *United States, supra,* and it therefore is not an authority upon this point. On the other hand, the position here contended for is sustained by the following authorities:

In *Cook* v. *The State* (4 Tex. App., 265, 268), the jury without objection was permitted to take with them the indictment upon which a former conviction of the defendant was endorsed, and the matter was first presented on a motion for a new trial. The question was disposed of by the appellate court in the following language:

> If such were the fact, we doubt whether it could be taken advantage of on the motion for a new trial. It was certainly the duty of defendant to have made his objection at the time, or before the indictment was given to the jury, so that the court might have had

> them furnished, if necessary, with a certified copy of the indictment, omitting the indorsements.

In *Anschicks* v. *The State* (6 Tex. App., 525, 536), in considering the same state of facts as existed in the *Cook* case, the court used the following language:

> It was the business of counsel to see to it that the jury were permitted to carry with them such papers only as were proper to be used in their retirement; and if the attention of the court had been called to the subject, and it had refused to give the proper direction, it should have been presented by bill of exceptions. *Cook* v. *The State* (4 Texas Ct. App., 256). In practice it is usual and proper for the jury in charge of a criminal case to take the indictment with them in their retirement. If, in any case, there should be any valid reason why this should not be permitted, it would be an easy matter to obviate it by the use of proper caution at the trial, and before the jury retired.

In *State* v. *Tucker* (75 Conn., 201, 203) the record of the judgment of conviction in the town court was allowed to go to the jury without objection made at the time. In sustaining the action of the trial court in refusing to hold that such fact was sufficient ground for a new trial the appellate court said:

> If counsel had asked the court to have the record of that judgment taken from the file, it should have been removed, if practicable,

> and if not the court, had counsel so requested, should have directed the jury to disregard it. But if counsel for the accused believed that it might be harmful to his client to have the record of the former judgment before the jury, he should have made some endeavor to have it removed from the file, either before or after the jury retired to their room, or should have requested the court to direct the jury not to consider it. It is the duty of counsel as well as of the court to ascertain what papers are delivered to the jury. (2 Thompson on Trials, sec. 2591.)

In *Forbes* v. *Commonwealth* (90 Va., 550, 551), in refusing to review the case on the ground that the indictment was sent to the jury with the former verdict written thereon, the court said:

> It is clear that neither of the grounds upon which the motion was based is well taken. No objection was made before verdict to the jury's taking the indictment, and certainly the court had no power to emasculate the record by erasing therefrom the former verdict.

In *Cargill* v. *Commonwealth* (93 Ky., 578, 581), in disposing of the question whether the taking by the jury of the indictment with a former verdict of guilty indorsed thereon was a vital error, the court said:

> That the indorsement of the former verdict was allowed to remain on it was of course an oversight; but the appellant made no objection, and it was his business, as much as that of the other side, to see that the proper pa-

> pers were taken by the jury, and if not being done, to call the court's attention to it. By proper vigilance upon his part his right of objection would have been available to him.
>
> An accused has a right, of which he can not be deprived, to be in court when the case is submitted to the jury. He has a right to see what papers they take to their jury room and to make any question he desires relative thereto.

In *Railway* v. *Higgins* (53 Ark., 458, 467) the court held that—

> There was no error in the refusal of the circuit court to grant appellant a new trial on the ground that the complaint in this action was delivered to the jury with the former verdict indorsed thereon. There was no objection made to the giving of it to the jury, and it does not appear that it was fraudulently or designedly delivered to influence them, but the contrary is true.

This case was cited and followed in *Railway Company* v. *Sweet* (60 Ark., 550, 556), which presented a similar state of facts.

In *State* v. *Shores* (31 W. Va., 491, 499) it appeared that Shores and a man by the name of Hall were jointly indicted for burglary, but Shores was being tried separately. When the jury retired, they were given the indictment, which had indorsed thereon a former conviction of Hall. While the jury was deliberating, the judge refused a request to send to the jury room and take from the jury this indictment. The Supreme Court held that the action of

the court in refusing such a request was not a vital error, saying:

> If the defendant had moved the court not to let the jury have the indictment, but a copy, it would raise another question that we will not here decide. He might also have asked the court to have instructed the jury not to regard the indorsement on the indictment of the finding against Hall.

In *Smalls* v. *The State* (105 Ga., 669, 675) it was held that "if a party desires a verdict rendered at a former trial of the same case concealed from inspection by the jury, he should present a request to this effect," citing as authority four cases previously decided by the Supreme Court of Georgia.

In *Maynard* v. *Fellows* (43 N. H., 255, 259), where a paper had been improperly sent to the jury and it was insisted that in consequence thereof a new trial should be granted, the court said:

> It is not enough to say that a paper was improperly sent to the jury by the adverse party without his knowledge. It is his duty to ascertain what papers are sent to the jury before they leave the court; and no motion for a new trial should be allowed merely because this duty has been neglected. It should appear that the counsel used due care; that none but proper papers were passed to the jury; and that the paper in question was sent to the jury by some mistake or through some trick or artifice of the opposite counsel. Here it is only said that the paper was handed to the jury without the knowledge of the trustees' counsel.

In *Gardner* v. *King* (58 N. H., 203) the court held that it was not a sufficient reason for setting aside a verdict that a deposition from which certain words had been excluded went to the jury room because "it was the duty of counsel to see that only the proper papers were taken by the jury when they retired, and, in the absence of fraud or artifice, a verdict will not be disturbed because incompetent evidence may, through neglect of counsel whose duty it was to prevent it, have fallen into the hands of the jury."

In *Clapp* v. *Clapp* (137 Mass., 183, 184) it appeared on the trial of the case in a superior court that the writ, upon which was a memorandum of the amount of the judgment of the municipal court, was inadvertently passed to the jury. The jury returned a verdict for the plaintiff, and in determining whether such fact was sufficient ground for a new trial the court said:

> The plaintiff was in no fault, and it would be unjust that he should be deprived of his verdict because of this memorandum upon the writ, even though the defendant was guilty only of inadvertence in failing to see that the papers he caused to be produced in the Superior Court were in proper form. The power in the Superior Court to grant a new trial, in its discretion, furnishes a sufficient protection to the substantial rights of both parties.

We have been unable to find any case in which the facts were the same, or substantially the same as those presented in this case, wherein it was held

that a new trial would be awarded, unless the objection was made at the time the paper went into the hands of the jury, or at least while the jury was deliberating as to the verdict. It is not intimated that the indictment in this case was fraudulently or with any improper motive handed to the jury, or that there was any intent upon the part of anyone that the indorsement thereon should have any influence upon them in making up their verdict. The facts with reference thereto are detailed in the affidavit of Mr. Woodward, plaintiff in error's attorney, wherein he says that he "did not notice the action and was not aware of the action of the deputy clerk in handing the indictment to the jury;" that he thought that the papers handed the jury "were merely forms of verdict to be determined by the jury," and was first apprised of the fact several days after the verdict had been rendered. This affidavit shows that there was no effort made upon the part of the plaintiff in error's attorneys to ascertain what papers were delivered to the jury, and that they exercised no diligence to avoid any prejudice which might thus arise against their client.

Third. *The record fails to disclose that the plaintiff in error was prejudiced by the fact that the indictment with the indorsement complained of thereon was in possession of the jury; and the mere fact that such indorsement was in their possession, and might have been or was read by them, affords no sufficient ground for a new trial.*

The general rule upon this subject is thus stated in 12 Enc. of Pl. & Prac., p. 599:

> Where it is permissible for the jury to take the pleadings with it on its retirement, the fact that the verdict on a former trial appears on one of the pleadings will not be ground for a new trial.

The following authorities support this proposition:

In *Hardy* v. *State* (35 Tex. Crim. Rep., 545, 561, 562) it appeared that the former verdict had been written upon the indictment. This fact being called to the court's attention, at his suggestion the clerk attempted to obliterate it by spreading ink over it, and the indictment in this condition was handed to the jury. There was a dispute of fact as to whether or not it was legible. In discussing the general question, the appellate court said:

> It has been repeatedly held, however, that if acts or conduct of this character were essentially injurious to appellant's rights, such acts or conduct would constitute fundamental error, and in such case no exception was necessary to be reserved. Evidently, in the cases above alluded to, nothwithstanding legible verdicts were taken out by the jury, such conduct was not regarded as fundamental error. (*Cook* v. *State* and *Anschicks* v. *State, supra.*)

The court further held that if the jury had read or attempted to read the obliterated verdict "in the absence of some showing of injury to appellant, we could not consider this as fundamental error, or

such error as ought to have authorized the court below to grant a new trial when the matter was first presented to it on the motion for a new trial."

In *State* v. *Shores, supra,* one reason assigned by the court why a new trial should not be granted was that—

> Every member of the jury may have been in court and heard the verdict against Hall and still that would not have disqualified them as jurors—

and the fact that the indictment was in possession of the jury did not prejudice the defendant in the result reached.

In *Green* v. *The State* (38 Ark., 304, 314), wherein on the trial below a transcript on which was indorsed in violet-colored ink a former verdict of guilty had been taken out by the jury, in deciding whether such fact was ground for a new trial, the court said:

> There was nothing in the transcript that could have been prejudicial to appellant. The jury, perhaps, saw the verdict of the former jury, which was indorsed upon it. If they could have been influenced by it they would have returned a verdict for murder in the first degree instead of the second. It was, doubtless, a matter of public notoriety that appellant had been before tried, convicted of murder in the first degree, and obtained a new trial, and the jury, perhaps, knew that before they saw the verdict indorsed upon the transcript, if they saw it.

In *Harold* v. *Commonwealth* (8 S. W., 194, 196) wherein the court of appeals of Kentucky had before it the question whether or not the fact that the jury held in its possession the indictment with the verdict of a former jury written thereon is ground for a new trial, the court said:

> Section 248, criminal code, provides that, "upon retiring for deliberation, the jury may take with them all papers and other things which have been received as evidence in the cause;" and, as it is usual and proper for them to take the indictment, we do not think the court erred in that respect, although there was written upon the indictment the verdict of the previous jury. Nor do we see how appellant has been prejudiced; for it is almost impossible to conceal from a jury the result of a previous trial, if one has taken place.

Among many cases in which facts practically identical with those presented in the present case, *Ogden* v. *United States, supra,* appears to stand alone in holding that the mere fact that a jury has in its possession, when considering of its verdict, an indictment upon which is written a former verdict of guilty constitutes of itself ground for a new trial. The learned judge in that case cites in support of the conclusion of the court (112 Fed., 527) the following cases:

Dana v. *Tucker* (4 Johns., 487), wherein it was held that the better opinion is, and such is the rule adopted by that court, that the affidavits of jurors should not be received to impeach a verdict.

Cluggage v. *Swan* (4 Bin., 150), wherein, after a lengthy discussion, the Supreme Court of Pennsylvania reached the same conclusion with reference to a verdict which had been reached by casting lots.

Stoll v. *Stoll* (197 Pa., 243), in which the court of the same state made the same holding on a like state of facts.

La Boity v. *Lundgren* (41 Nebr., 312), wherein it appeared that the principal question in dispute was whether or not the signature to a certain deed was genuine. Accidentally, or otherwise, a note which had not been put in evidence, but which contained the signature of the party whose name appeared to the deed, got into possession of the jury. The court held that it was fair to assume, unless demonstrated to the contrary, that the signature was considered and examined by the jury, and that its admission to the jury room was prejudicial to the party against whom the verdict was rendered, and that therefore the verdict should be reversed and a new trial awarded.

State v. *Snyder* (20 Kans., 306), in which it was shown that the bailiff who had the jury in charge, and who had been called as a witness by the State against the prisoner, was in the jury room the greater part of the time while the jury were deliberating on the verdict, and no explanation of his presence was made by the State. The court held that this was sufficient ground for a new trial.

People v. *Mack* (42 Mich., 267), in which it was held that the presence of the officer having the jury in

charge with the jury during their deliberations was of itself sufficient ground for a new trial. The court reached this conclusion mainly on the ground that the very presence of an outsider might act as an intimidation and prevent a full and free discussion by the jury, and pointed out the many evils that might arise from permitting such conduct.

Moss v. *Commonwealth* (107 Pa., 267), in which it was held that it was not sufficient ground for reversing a judgment where it appeared that one of the jurors was absent from the remainder of the jury for two days in the custody of an officer by permission of the court and under suitable instructions, as the verdict reached was only for manslaughter.

Meyer v. *Cadwalader* (49 Fed., 32), wherein it was held that bitter publications made in a newspaper and circulated during the trial of the case afforded good grounds for a new trial.

It is clear that many of these cases have no bearing upon the question here involved, and that there is a very marked distinction between the facts in those cases, which do have a bearing, and the facts presented in this case. The case which most resembles the present one is that of *La Boity* v. *Lundgren*, wherein a note containing the signature of the party whom it was alleged forged the instrument in dispute was in possession of the jury. But it is a general rule that a verdict will be set aside where it appears that the jury obtained, before a verdict was reached, evidence other than that introduced on the hearing. The signature to this note was of course very material

evidence, and if it had been presented on the hearing, opportunity would have been given to have had an expert examine and analyze the handwriting and explain its discrepancies or similarity to the handwriting of the signature to the forged instrument. Such principle is not involved in the present case. As suggested by the Supreme Court of West Virginia, if all of the jurors had been present when the former verdict was announced, or had been otherwise informed that such a verdict had been rendered, such knowledge would not have rendered them incompetent as jurors, because it would not have incapacitated them from returning a verdict upon the law and the evidence given on the trial. The verdict of a former jury is only an expression of opinion, an opinion probably reached upon entirely different evidence, and this is understood by every juror.

There is certainly nothing in this record to indicate that plaintiff in error was prejudiced by the presence of the record of the former verdict in the jury room. As a part of the same entry, it was shown that a new trial was granted. This fact was calculated not only to remove from the minds of the jury all prejudice that might have arisen against plaintiff in error from a former verdict, but even to create a prejudice in his favor, because they had a right to and probably did assume that the court was of the opinion that the evidence introduced did not warrant a conviction.

Furthermore, the evidence introduced in support of the motion for a new trial does not indicate that the result reached was in the least affected by this entry

upon the indictment. The affidavit principally relied upon is that of the juror Carpenter, who swore "that the fact appearing on said indictment created an unfavorable opinion against said defendant" in his mind. In the first place, this statement can not be considered by the court. In *Mattox* v. *United States* (146 U. S., 149) this court quoted approvingly from a decision rendered by Mr. Justice Gray when a member of the Supreme Judicial Court of Massachusetts, wherein it was said:

> But a juryman may testify to any facts appearing upon the question of the existence of any extraneous influence, *although not as to how far that influence operated upon his mind.*

In the second place, while the juror states that the former conviction created an unfavorable opinion in his mind against plaintiff in error, yet he does not intimate that the verdict was not reached upon the law given by the court and the evidence introduced on the trial, or that his conclusion of guilt was in the least influenced by such circumstance.

A glance at the evidence introduced on the trial will show that no other result could possibly have been reached by any fair-minded jury. Plaintiff in error was charged with testifying falsely that Frank Werta had resided continuously in the United States for five years immediately prior to the time of the hearing of his application for citizenship, and that he, Holmgren, had been acquainted with and had known Werta during said five years. Holmgren's affidavit, or a copy of the same, wherein this testimony was

given, is a part of the evidence. (R., p. 48.) This affidavit was given on September 21, 1903, and it is undisputed that Werta came to this country in the early part of 1901, and that Holmgren was introduced to him about three months after his arrival. Holmgren did not take the witness stand, nor was the evidence of the several witnesses contradicted in the least by any witness introduced by him.

III.

It was not error for the trial court to refuse to charge the following request submitted by plaintiff in error, to wit:

> I charge you that if you believe the testimony of the witness Frank Werta, then that said witness was an accomplice in crime with the defendant; and I instruct you that before you can convict said defendant the testimony of the witness Frank Werta should be corroborated by the testimony of at least one witness or strong corroborative circumstances.

Such refusal was not in error for the following reasons:

First. *There is no evidence in the record which tends to show that Werta was an accomplice of Holmgren.*

No connection whatever is shown between Werta and Holmgren, except the mere fact that Werta was present at the time the false testimony was given. Werta testified that he did not ask Holmgren to go to court and give testimony, and that he did not know who did ask him, if anyone did (R., p. 32); that he did not accompany Holmgren to court, and

that Holmgren did not ask him for a cent of money, and he paid him nothing (R., pp. 32, 33). Section 2156, Revised Statutes, provides that the "oath of the applicant shall in no case be allowed to prove his residence," and, therefore, the testimony of Holmgren could not have been supplemental to or corroborative of any testimony given by Werta upon this point.

That under these facts Werta was not an accomplice of Holmgren clearly appears from the following authorities:

> Webster's definition of an "accomplice" is as follows: A cooperator or associate in general; an associate in crime; a participator or partner in guilt. Under such definition, the purchaser of liquors is not an accomplice of the person making the unauthorized sale. (*People* v. *Smith*, 1 N. Y. Cr. R., 72–73.)
>
> An accomplice is a person involved either directly or indirectly in the commission of a crime. To render him such, he must in some manner aid or assist or participate in the criminal act, and by that action he becomes equally involved in guilt with the other party by reason of the criminal transaction. (*People* v. *Smith* (N. Y.), 28 Hun, 626–627; *People* v. *Emmerson*, 5 N. Y. Supp., 374–376.)
>
> The buyer of a lottery ticket is not an accomplice with the seller. (*People* v. *Emmerson*, *supra*.)
>
> To constitute an "accomplice," one must be so connected with a crime that at common law he might himself have been convicted,

either as the principal or as an accessory before the fact. To warrant such a conviction, the one accused must have taken part in the perpetration of, or preparation for, the crime, with intent to assist in the crime. The fact that one knew of defendant's purpose to commit a crime, and performed an act tending to assist in the perpetration of the offense, did not, as a matter of law, render him an accomplice, within the rule requiring testimony of accomplices to be corroborated, where it was in dispute whether he did the act with intent that it should aid in the commission of the crime. (*People* v. *Zucker*, 46 N. Y. Supp., 766, 767, 20 App. Div., 363.)

A person who participates in the moral guilt of a crime, but is not connected therewith in such a way that he could be indicted for the offense, is not an accomplice. (*Dunn* v. *People*, 29 N. Y., 523–527.)

Mere knowledge on the part of a witness that the defendant committed the crime, does not render such witness an accomplice, so as to require corroboration of his testimony. To require or warrant an instruction on accomplice testimony, there must be some evidence of a witness's complicity in the crime for which the defendant is being tried. (*Brown* v. *State*, 6 Tex. App., 286–309; *Ham* v. *State*, 4 Tex. App., 645–674.)

Second. *The request did not state the law applicable to the case.*

It certainly can not be insisted that under the evidence Werta was *as a matter of law* an accomplice of the plaintiff in error. At the most, this was a question of fact for the determination of the jury. But the request in the form presented assumes that Werta was an accomplice. It has often been declared by this court that no instructions requested should be given which assume as a matter of fact that which is not conceded or established by uncontradicted proof. (*Insurance Co.* v. *Foley* (105 U. S., 347, 353); *Bank* v. *Hunt* (11 Wall., 391, 394); *Railroad* v. *Gladmon* (15 Wall., 409); *Insurance Co.* v. *Baring* (20 Wall., 159, 161).)

In *Katz* v. *Phalen* (2 How., 375, 381) it was said:

> A party can not assign for error the refusal of instructions to which he has not a right to the full extent as stated, and in its precise terms.

Therefore, since it would have been clearly improper for the court to have submitted to the jury the request as presented, it was equivalent to no request at all. And it is equally as well settled, that where there is evidence introduced to support a plea, but the court is not requested to charge the jury upon the issue raised, the failure of the court to do so can not be assigned for error. (*Express Company* v. *Kountz* (8 Wall., 342); *Carter* v. *Carusi* (112 U. S., 478, 484).)

IV.

The two following questions are raised in plaintiff in error's brief, which were not mentioned in his petition for a writ of certiorari:

First. *That the court erred in not sustaining the demurrer to the third count of the indictment—the count upon which plaintiff in error was convicted—because it is not sufficiently alleged therein that he was sworn before testifying.*

It appears from the record that this question is now raised for the first time in any court.

The first assignment of error (R., p. 18) is in the general language—

> That the said district court committed manifest error in overruling the demurrer of the said defendant to the third count of the indictment in said action.

While in the demurrer (R., pp. 11, 12) several alleged defects in the several counts are specifically pointed out, yet this particular criticism is nowhere mentioned or suggested. *Nor was any mention of it made in the brief filed in the Circuit Court of Appeals on behalf of plaintiff in error, or in the petition for a writ of certiorari to this court.*

It does appear, however, in the third count, as it is set forth in this record (R., p. 9), that by either an inadvertence of the draftsman or the printer, in the first allegation with reference to the administration of the oath, the name of Frank Werta was inserted for that of plaintiff in error, but it is subsequently alleged that the "said Gustav Holmgren *having taken*

said oath to testify as aforesaid, did then and there willfully, etc., and contrary to his said oath, testify, etc."

Certainly this immaterial and accidental defect can avail plaintiff in error nothing, especially when first relied upon at this late day.

Second. *That the court erred in admitting an alleged copy of the affidavit made by Holmgren, in which his false testimony was set out.*

It appears that Holmgren's testimony was put in the form of an affidavit and was signed and sworn to by him, and made a part of the record of the court. This, with the other records of the court, was destroyed by the San Francisco fire of April, 1906 (R., p. 40). One T. A. Duryea, who was an attorney connected with the United States Attorney's office, was called by the Government as a witness, and testified that he had thoroughly examined the affidavit made by Holmgren and that he was familiar with the contents of it, and that he had made a correct copy of same (to use his own language), filling "in the evidence given by the witness Holmgren in that affidavit from my memory, which I remember particularly and specifically. There is not any question about my memory in that respect" (R., p. 47). And this was the copy admitted in evidence (R., pp. 48, 49).

As the original had been destroyed, it was of course unnecessary to reduce the copy to writing, but the fact that it was placed in this more endurable form can not render its admission an error.

It is further insisted that the indictment alleges that the testimony given by Holmgren was oral, and that evidence of the contents of a written affidavit is, therefore, not admissible to prove the charge. However, no such limitation appears in the indictment; and, moreover, the evidence was doubtless given orally and then reduced to writing and signed by Holmgren. But at any rate there is certainly no fatal variance between the allegations of the indictment and the proof of perjury.

It is therefore insisted that the record presents no reversible error, and that the judgment of the trial court and of the Circuit Court of Appeals should be affirmed.

J. A. FOWLER,
Assistant Attorney-General.

FEBRUARY, 1910.

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